

# AMERICAN STATE GOVERNMENT

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TO  
MY WIFE



## PREFACE

THE position of the states in the American governmental system is unique. On the one hand, they bear important relations to the National Government, and, on the other, to the local governments. The National Government may be studied without particular consideration of the local governments, and *vice versa*. Neither the National nor the local governments, however, may be profitably studied or thoroughly understood as isolated phenomena without reference to their relations to the states. It is from this point of view that the states occupy a pivotal position and form the most essential part of a study of the whole American governmental system. Not only can no part of that system be satisfactorily studied without consideration of the states, but the study of the latter is of intrinsic importance on account of the great extent to which the general welfare of the mass of the people is affected by the organization and activities of the states.

On these accounts, it is somewhat surprising that the study of state government has heretofore been comparatively neglected. This situation, however, is being gradually remedied. More attention has been paid to the study of state government, especially during the last decade. This is evidenced by the number of investigations of state government and administration which have been made in many states during this period by efficiency and economy commissions or similar bodies. The author has been fortunate enough to be officially connected with such investigations in Illinois and Oregon, and has attempted to embody in the present work the results of this first-hand observation and experience, fortified by the results of similar investigations and studies made in other states, or in the country generally. In spite of these studies, there are still many gaps in our knowledge of the working of state governmental processes, and many of the operations of such governments have as yet received no



adequate scrutiny from competent observers. Subject to these unavoidable limitations, the attempt has been made in this volume to present a general survey of state government in such form as may be useful both to the general reader and also to college and university classes studying the subject. It is also hoped that, where it is desired to give some attention to local government in connection with general courses on state government, sufficient material for this purpose will be found in Chapter XVIII and several of the appendices. Moreover, throughout the work consideration has necessarily been given, at least incidentally, to conditions in local government. The treatment is by no means exhaustive, but lists of references appended to most of the chapters direct attention to much of the more important material for further reading. A knowledge of many of the topics treated is essential for all who desire to exercise intelligently the duties of citizenship. The object of the work will have been accomplished if it assists in promoting the cause of political progress, which, in a democracy, rests at bottom upon the education and practical experience of the mass of the voters in governmental affairs.

Although the present work in its entirety is substantially new, Chapters VIII, IX, XI, and XIV are based on the corresponding chapters in the author's *Principles of American State Administration*, published in 1917 by D. Appleton and Company. Some use has also been made of the chapters on state government contributed by the author to *The Modern Commonwealth*, published in 1920 as Volume V of the Centennial History of Illinois, and of the report prepared by the author in 1918 for the Consolidation Commission of Oregon. The substance of Chapter X appeared under the same title in the *American Political Science Review* for August, 1922. Appendix IV is reprinted in part from the article by the same title which appeared as a supplement to the *National Municipal Review* for November, 1920; while a portion of Chapter VI appeared in the issue of the same periodical for March, 1923. Chapter XIII was published under the same title in the *Illinois Law Quarterly* for February, 1923; while a portion of Chapter III appeared in the issue of the same journal for June, 1922.

A part of Chapter I appeared in the May, 1921, number of the *Michigan Law Review*. Chapter XVI is based in part upon the author's article on *The State Judiciary* in McLaughlin and Hart's *Cyclopedia of American Government* (Volume III, pp. 394-398). Grateful acknowledgment is made to the publishers and editors of these books and periodicals for their kind permission to reprint this material in the present volume. The author is deeply indebted for valuable criticisms and suggestions to his colleagues, Professors Garnér, Fairlie, Story, and Berdahl, each of whom has read a portion of the manuscript or proof. Finally, thanks are due to numerous political scientists and public officials in all parts of the country, who have cheerfully responded to the author's requests for information. For errors and shortcomings, it is needless to say that the author alone is responsible.

J. M. M.



# CONTENTS

	PAGE
PREFACE . . . . .	viii
 CHAPTER	
I. THE PLACE OF THE STATES IN THE UNION . . . . .	1
The Federal System . . . . .	3
The Admission of States into the Union . . . . .	7
Constitutional Rights and Obligations of the States as	
Members of the Union . . . . .	10
State and National Coöperation . . . . .	14
Interstate Relations . . . . .	20
The States and Foreign Relations . . . . .	24
II. THE STATE CONSTITUTION . . . . .	29
The Original State Constitutions . . . . .	30
Development of State Constitutions . . . . .	31
Contents of State Constitutions . . . . .	32
The Bill of Rights . . . . .	32
The Separation of Powers . . . . .	34
Constitutional Conventions . . . . .	39
Legislative Proposal of Amendments . . . . .	44
Amendment by Popular Initiative . . . . .	48
III. STATE POWERS AND LIMITATIONS . . . . .	51
Constitution Making Power . . . . .	51
Financial Powers . . . . .	52
Regulation of Commerce . . . . .	54
Regulation of Personal and Property Rights . . . . .	55
The Police Power . . . . .	58
The Nature of the Police Power . . . . .	58
The Scope of the Police Power, the Fundamental Objects	60
The Economic or Newer Phase . . . . .	63
The Regulation of Occupations . . . . .	64
Liquor Legislation . . . . .	65
Race Legislation . . . . .	66
Constitutional Limitations on the Police Power . . . . .	67
Conclusion . . . . .	70
IV. SUFFRAGE, PARTIES, AND ELECTIONS . . . . .	73
The Right of Suffrage . . . . .	74
The Extension of the Power of the Electorate . . . . .	75

CHAPTER	PAGE
Negro Suffrage . . . . .	77
Woman Suffrage . . . . .	83
General Qualifications for Voting . . . . .	85
The Party System . . . . .	87
Party Organization and Platforms . . . . .	91
The Nomination of Candidates . . . . .	95
The Conduct of Elections . . . . .	97
Ballot Forms . . . . .	103
V. NEWER INSTITUTIONS OF DEMOCRACY . . . . .	110
The Direct Primary Election . . . . .	110
The Working of the Direct Primary . . . . .	114
The Short Ballot . . . . .	122
The Recall . . . . .	126
The Initiative and Referendum . . . . .	128
VI. THE LEGISLATURE: ORGANIZATION . . . . .	141
Historical Development . . . . .	141
The Bicameral System . . . . .	146
Differences Between the Houses . . . . .	152
Apportionment of Members . . . . .	153
The Bases of Representation . . . . .	157
Election of Members . . . . .	165
Legislative Sessions and Privileges . . . . .	170
VII. THE LEGISLATURE: POWERS AND PROCEDURE . . . . .	174
Extent and Limits of Legislative Power . . . . .	174
Limitations on Financial Powers . . . . .	177
Special Legislation . . . . .	179
Legislative Procedure . . . . .	181
Organization for Work . . . . .	185
Introduction and Passage of Bills . . . . .	187
The Committee System . . . . .	190
Working of Legislative Rules . . . . .	194
Forces Influencing Legislation . . . . .	200
Legislative Reform . . . . .	203
VIII. THE STATE EXECUTIVE . . . . .	211
The Governor: Election, Term and Compensation . . . . .	211
The Governor's Legislative Powers . . . . .	216
Calling Special Sessions . . . . .	218
The Governor's Initiative in Legislation . . . . .	220
Approval and Veto of Bills . . . . .	222
The Governor's Administrative Powers . . . . .	228
The Power of Appointment . . . . .	230
The Power of Supervision . . . . .	233

# CONTENTS

xiii

CHAPTER

PAGE

	The Power of Removal . . . . .	234
	The Military Power . . . . .	239
IX.	STATE ADMINISTRATIVE ORGANIZATION . . . . .	242
	The Lieutenant-Governor . . . . .	242
	The Executive Council . . . . .	243
	Heads of Departments . . . . .	244
	The Secretary of State . . . . .	245
	Relations of Governor and Heads of Departments . . . . .	246
	Forms of Control Over the Administration . . . . .	248
	State Officers, Boards, and Commissions . . . . .	259
	Powers of Boards and Commissions . . . . .	262
	Boards v. Single Commissioners . . . . .	265
	State Administrative Disintegration . . . . .	268
	The State Civil Service . . . . .	269
X.	STATE ADMINISTRATIVE REORGANIZATION . . . . .	283
	Relation of Governor and Legislature . . . . .	284
	The Budget System . . . . .	286
	Heads of Executive Departments . . . . .	287
	Consolidation of Administrative Agencies . . . . .	289
	Boards v. Single Commissioners . . . . .	291
	Selection of Administrative Officials . . . . .	293
	Conduct of Administrative Business . . . . .	295
	Executive Responsibility . . . . .	296
	Conclusion . . . . .	297
XI.	TAXATION AND FINANCE . . . . .	303
	State Debts . . . . .	304
	The General Property Tax . . . . .	305
	Equalization of Taxes . . . . .	310
	State Supervision of Local Assessments . . . . .	312
	The Taxation of Corporations . . . . .	316
	Separation of State and Local Revenues . . . . .	318
	Classification . . . . .	322
	State Supervision of Local Accounts . . . . .	325
	State Accounting Methods . . . . .	326
	State Expenditures . . . . .	329
	The State Budget . . . . .	331
XII.	STATE REGULATION OF BUSINESS CORPORATIONS . . . . .	344
	Blue Sky Laws . . . . .	348
	Foreign Corporations . . . . .	350
	Banking and Insurance . . . . .	351
	The Regulation of Railroads . . . . .	355
	The Regulation of Public Utilities . . . . .	360

CHAPTER		PAGE
XIII.	STATE LABOR LEGISLATION . . . . .	371
	Conditions of Work . . . . .	372
	Hours of Labor . . . . .	374
	The Payment of Wages . . . . .	378
	The Minimum Wage . . . . .	380
	Employers' Liability . . . . .	382
	Workmen's Compensation . . . . .	383
	Collective Bargaining . . . . .	387
	The Settlement of Industrial Disputes . . . . .	389
	Convict Labor . . . . .	391
	Administrative Agencies . . . . .	394
XIV.	ADMINISTRATIVE SERVICES . . . . .	397
	The Administration of Education . . . . .	398
	The State Superintendent . . . . .	399
	State Supervision of Local Schools . . . . .	400
	State Educational Institutions . . . . .	402
	Administration of Charities and Correction . . . . .	403
	State Boards of Control . . . . .	404
	The Dual System . . . . .	405
	Public Health Administration . . . . .	406
XV.	THE ENFORCEMENT OF STATE LAW . . . . .	413
	The Machinery of Law Enforcement . . . . .	413
	The State Department of Justice . . . . .	414
	Law Enforcement and Home Rule . . . . .	419
	State Control of Law Enforcement . . . . .	422
	The State Militia . . . . .	423
	The State Police . . . . .	425
XVI.	THE ORGANIZATION OF THE STATE COURTS . . . . .	429
	Historical Development of State Courts . . . . .	429
	Organization of the State Courts . . . . .	433
	State Supreme Courts . . . . .	435
	Jurisdiction of the State Courts . . . . .	442
	The Selection of Judges . . . . .	444
	Tenure, Compensation, and Removal of Judges . . . . .	451
XVII.	THE WORK OF THE STATE COURTS . . . . .	455
	The Development of the Law . . . . .	455
	Judicial Procedure . . . . .	457
	Procedure in Civil Cases . . . . .	459
	Procedure in Criminal Cases . . . . .	460
	Working of the Machinery of Criminal Justice . . . . .	463
	The Jury System . . . . .	466
	The Indeterminate Sentence . . . . .	472

# CONTENTS

xv

CHAPTER	PAGE
Parole and Probation . . . . .	473
The Pardoning Power . . . . .	475
Judicial Review of Legislation . . . . .	482
Judicial Review of Administrative Action . . . . .	489
Judicial Reform . . . . .	491
 XVIII. THE STATE AND LOCAL GOVERNMENT . . . . .	 499
Legislative Control Over Cities . . . . .	501
Constitutional Limitations on Legislative Control . . . . .	502
Constitutional Home Rule . . . . .	505
Administrative Control Over Cities . . . . .	507
Judicial Control Over Cities . . . . .	509
Forms of City Government . . . . .	510
The Commission Form . . . . .	511
The Commission-Manager Plan . . . . .	512
The State and Local Rural Government . . . . .	513
Special Municipal Corporations . . . . .	514

## APPENDICES

I. A MODEL STATE CONSTITUTION . . . . .	519
II. HARE SYSTEM OF PROPORTIONAL REPRESENTATION ("P. R.") . . . . .	581
III. THE SHORT BALLOT . . . . .	591
IV. ADMINISTRATIVE REORGANIZATION IN ILLINOIS . . . . .	605
V. CRIMINAL JUSTICE . . . . .	611
VI. THUMB-NAIL SKETCHES OF THE FOUR PRINCIPAL TYPES OF CITY GOVERNMENT . . . . .	617
VII. THE STORY OF THE CITY-MANAGER PLAN . . . . .	624
VIII. RAMSHACKLE COUNTY GOVERNMENT . . . . .	631
IX. PROBLEMS OF RURAL GOVERNMENT . . . . .	641
 INDEX . . . . .	 653





# AMERICAN STATE GOVERNMENT

## CHAPTER I

### THE PLACE OF THE STATES IN THE UNION

THE term "state," as used strictly in political science, is applied to an independent political society, having not only population, territory, and an organized government, but also possessing sovereignty. This, however, is not the meaning of the word as employed in the title of this work. The American states at the present time have the first three elements that go to make up a state in the strict sense, but they are not endowed with sovereignty.<sup>1</sup> They no doubt possessed it prior to the adoption of the Federal Constitution of 1787<sup>2</sup> and were therefore strictly entitled to be designated as "states," but they have now become merely component parts of the Federal Union. They are neither sovereign, on the one hand, nor mere administrative districts on the other, but largely autonomous, self-governing entities possessing many of the characteristics of real states. Their relation to the Union is not, therefore, the same as that of a county to the state. In order to differentiate them from true states, it has been suggested that they be called "commonwealths," but this term has not come into general use.<sup>3</sup>

In spite of their lack of sovereignty, the states are in some

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<sup>1</sup> There are some, however, who contend that they are partly sovereign, *i.e.*, that sovereignty is divided between the United States and the states. This is the view generally held by the courts.

<sup>2</sup> Some authorities, however, including President Lincoln, deny this.

<sup>3</sup> In his *Old Master and Other Essays*, Woodrow Wilson maintains that, although not possessed of sovereignty, they are nevertheless states, sovereignty not being an essential constituent element of a state. This is also the German view, *viz.*, that the essential characteristic of a state is the power to command and enforce obedience rather than the possession of sovereignty.

respects the most important of the three grades of government in the United States, national, state, and local. They have been aptly described as "the pivot around which the whole American political system revolves." They are in no sense the creation of the national government. Their place as members of the Union and their rights and duties are determined by the national constitution. They have their own constitutions and determine their own form of government within the limits prescribed by the national constitution. They were already in existence and had their own constitutions and governments before the Union was established or the national constitution framed. The chief task of the founders of the Union, therefore, was to determine what powers of government they should be left to exercise and what powers should be conferred upon the newly created national government; in short, it was a problem of division of power.

Although the powers of the national government have greatly increased within recent decades, the powers of the states collectively are still much more extensive. As has been well said, they are too varied and multifarious to be enumerated. To attempt to do so would involve cataloguing the greater mass of governmental activities and relationships with which we are familiar, such as the regulation of the ownership, use, and disposition of property, the regulation of industry, business and labor, education, contracts, marriage, divorce and the domestic relations generally, and the making and enforcement of the civil and criminal law. Except in the District of Columbia and the territories, the national government is a special government created for special purposes. In legislating for the territories, Congress has general and residuary powers, whereas when legislating for that part of the Union which has been erected into states, it has only specific powers which are enumerated, either expressly or impliedly, in the Federal Constitution. The states, on the other hand, are governments of general jurisdiction and powers. As has been indicated, the laws they enact deal with the most important relations of citizens with each other and with the government. Their activities affect the welfare and interests of the people in their daily lives and

ordinary occupations more vitally and intimately than do those of the national government.

### The Federal System

The Constitution of the United States, in the language of the Supreme Court, "looks to an indestructible Union, composed of indestructible states."<sup>4</sup> That instrument assumes the existence of the states and marks out a sphere of operation for them wherein they are not subject to control or interference by the national government. In this sphere they are just as supreme as is the national government in the sphere marked out for it. Neither government may therefore encroach upon the domain assigned to the other. The Supreme Court of the United States stands over each as a sort of sentinel or umpire for the purpose of keeping each strictly to the sphere which has been marked out for it. By this means conflicts are frequently prevented and the balance between the Union and the states is harmoniously preserved.<sup>5</sup> From the standpoint of the relation between the central and state governments, therefore, the government of the United States is federal in form, as distinguished from unitary or centralized government on the one hand and confederate government on the other.

The existence of the federal system of government in this country is due in part to historical reasons. The English colonies were planted in separate settlements along the Atlantic coast, for the most part unconnected with each other, except indirectly through the common mother country. As time passed, they became more closely connected, but the dissimilarities in their respective conditions prevented the development of a unitary form of government. In geographical extent, the United States is one of the largest of modern countries. The social, economic, and industrial conditions vary greatly between states, or at least between groups of states in different sections of the

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<sup>4</sup> *Texas v. White*, 7 Wall. 724 (1869).

<sup>5</sup> In cases of doubt, however, the Supreme Court, as an organ of the national government, would naturally be inclined, either consciously or unconsciously, to favor the extension of national power at the expense of the states. Many exceptions to this general rule may, however, be found in the decisions of the Court.

country. Such diversity of conditions would make it extremely difficult for the central government to enact and administer laws in a general way for the whole country as it does for the District of Columbia. Although the states are legally equal in the Union and no state can coerce another, they nevertheless vary greatly in size, population and racial composition. These diversities make the federal form of government in this country not only advisable but necessary in order that the character of the government may be adapted to the local environment, including social, economic, and geographical conditions and historical traditions.

In spite of the differences between states, it must not be forgotten that there is also a general similarity among them in the organization of their governments. This is due not only to the common source of the state governments in the colonial governments, which were in a general way modeled on that of England, but the states, especially the newer ones, have frequently copied governmental institutions and methods from each other and from the national government. Moreover, the common language and historical traditions, the ease of transportation and communication between states, and the freedom of movement of the population from one part of the country to another have all helped in the direction of similarity in the general outlines of state government. The boundary lines of many states, especially those of the West, are largely artificial. To a large extent the states are not natural units from a social or economic point of view, and many important economic activities, such as those of railroads, are carried on with little or no regard for state lines. Another unifying factor is the lack of separate state political parties, the principal parties being national in scope.

The federal form of government, as found in the United States, is not without certain weaknesses and disadvantages. Such a form of government necessitates the drawing of a line of demarcation between the powers of the national government and those of the states, and this is by no means an easy matter. Conflicts sometimes take place between the central and state governments, in spite of elaborate precautions designed to avoid

them. Moreover, even though it were possible to draw a dividing line at any given time which would be perfectly adapted to the existing economic and political conditions in the country, it would not long remain suited to such conditions, since they are constantly changing. Amendment of the Federal Constitution so as to provide a new and more suitable distribution of powers is a difficult undertaking. From one point of view the Civil War may be considered as a struggle to determine whether slavery was under the control of the states or of the nation. The regular legal means of settlement having failed, the issue was submitted to the arbitrament of the sword. In ordinary times, however, by constitutional amendment and by judicial interpretation, the distribution of powers is being gradually changed to suit new conditions. Happily, with a national Supreme Court as the arbiter of disputes between the central and state governments and with power to keep each government within its own sphere, the danger of conflict is greatly minimized and for a long time in fact serious conflicts have been lacking.

Although a certain degree of diversity of law among the states is needed in order to suit diverse conditions, a greater uniformity is desirable in many branches of law. The federal form of government has been criticized on the ground that it permits diversity of law in many matters where uniformity of law would be desirable. But this weakness, if such it be, is due not to anything inherent in the federal system, but rather to the manner in which the legislative power has been divided between the national and state governments. Some of the European countries which have the federal system have avoided this weakness by a different distribution of powers, *i.e.*, they have intrusted to their central legislatures rather than to those of the states the power to legislate on matters upon which uniformity of legislation is desirable. By voluntary action, however, the states have adopted uniform laws on some subjects, such as negotiable instruments and bills of lading, but on other subjects, such as marriage and divorce, there is a considerable degree of diversity in legal regulations. To a large extent, this diversity is unavoidable since the legislature is supposed to pass laws

for what it deems to be the interests of the people of its own state without regard to what may be suitable for people of other states.

In some European countries which have the federal system the criminal and civil law is national and therefore uniform, and so is the law of marriage and divorce. It is believed, however, that the United States is too large a country and local conditions are too diverse to make uniformity of law on these subjects desirable. As to marriage and divorce, however, there is undoubtedly considerable sentiment in favor of uniformity and a proposed uniform law on these subjects has been drafted by the National Conference of Commissioners on Uniform Laws for the consideration of the various state legislatures. Movements for nation-wide social reform which require state legislative action encounter much delay and expense in securing adherence by all the states. For this reason, legislation by the national government is preferably sought for this purpose whenever possible, but as in the case of the movement for the abolition of child labor, this is impossible without amendment of the Federal Constitution. A final disadvantage of the federal form of government consists in the fact that this form is sometimes embarrassing to the national government in providing for national defense and in the conduct of its relations with foreign nations. This results from the fact that, on account of the division of powers, the central government may not always be in a position to perform its international obligations without the voluntary coöperation of the states, which may, however, be lacking. This is especially true as to the enforcement of treaties which undertake to confer upon aliens rights of protection and the right to own property when the enforcement of such rights is in large measure dependent upon the action of the states..

In spite of these disadvantages, the federal form of government is the one best suited to existing conditions in the United States. It is the one best adapted to a country of large geographical extent, with a diversified population, and having varying standards of law and order. Moreover, it is the form which combines the advantages of a central government for the regu-

lation of matters of general interest and common concern with a system of local government for the management of purely local matters. It accordingly reconciles the interests of the country as a whole with those of each state or local community. Thus, the federal form harmonizes with the spirit of the Anglo-Saxon principle of local self-government. For its proper working it both requires and stimulates a high degree of political intelligence among the people. Some observers hold that, in view of its inherent weaknesses, the federal form of government is transitional, and that it tends to develop ultimately into the unitary or centralized form, just as the confederate form tends ultimately to develop into the federal type. This view may be true in the long run as the center of gravity changes gradually from time to time, and signs are not wanting that this may be the ultimate development in the United States. There seems to be no prospect, however, of a fundamental change in the American form of government in the immediate future.

### The Admission of States into the Union

The Federal Union consists, and has always consisted, of two parts: first, that part which has been erected into states, and second, that part which is composed of territories or dependencies which have not been admitted to full membership in the Union. Several methods have been followed in the admission of states into the Union. The original thirteen states became members of the Union by ratifying the Constitution of the United States. That instrument provided that it should go into effect when ratified by nine states. As a matter of fact, eleven states had ratified before the government under the new Constitution was established, and the other two original states, Rhode Island and North Carolina, came in shortly afterwards. The Constitution further authorized Congress to admit new states into the Union. Prior to the establishment of the Confederation in 1781, several of the states had ceded what was known as the Northwest Territory to the central government, and in 1787 the Confederate Congress passed an ordinance providing for the ultimate admission of portions of this territory as states in the Union. Subsequently, the Louisiana Territory



and other territories were acquired, and were in time admitted to the Union as new states. Altogether, thirty-five states have been admitted by act of Congress. Of these five have been carved out of the territory of older states. The boundaries of an existing state cannot be changed without its consent, but such consent may be given by the legislature of the existing state. Under this provision, Vermont was separated from New York in 1791; Kentucky from Virginia in 1792; Tennessee from North Carolina in 1796; Maine from Massachusetts in 1820; and West Virginia from Virginia in 1862. In the last-named case, the consent of the legislature of Virginia was not obtained, but the consent of a newly formed legislature in the western portion of the state, claiming to be the legal legislature, was held by Congress to be sufficient. Two new states have been admitted without passing through the territorial stage. Of these, Texas had been an independent state before its annexation and admission in 1845. Five years later, California was admitted out of the territory acquired from Mexico by the treaty of Guadalupe-Hidalgo, without having had an organized territorial government.

The remaining twenty-eight states have been formed out of preëxisting organized territory under the jurisdiction of the national government. The admission of a state is a matter which rests entirely in the discretion of Congress,<sup>6</sup> and the Constitution makes no provision as to the procedure of admission. The movement for admission has usually started in the territory itself, which has petitioned Congress to pass an "enabling act" authorizing the territorial government to provide for holding a convention to draw up a proposed state constitution, and the latter, if ratified by the voters of the territory, is then to be submitted to Congress for its approval. In some instances, however, territories have not waited for the passage of an enabling act, but have on their own initiative framed proposed state constitutions for submission to Congress and have even established governments under such constitutions before admission

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<sup>6</sup> Under the terms of the cession of the Northwest Territory, however, Congress was bound ultimately to organize that territory into states and admit them into the Union.

by Congress as states. This procedure, however, is irregular, and, as a rule, territories have not framed constitutions until after Congress has authorized such action.

In admitting new states into the Union, Congress may impose such conditions precedent as it sees fit. No matter how arbitrary such conditions may be, a state cannot secure admission until it complies with them. Congress has frequently seen fit to impose conditions. Thus, Nevada was admitted in 1864 on condition that the right to vote should not be denied on account of color. Utah was admitted on condition that she make "by ordinance irrevocable without the consent of the United States" provision for religious toleration and for the abolition of polygamy in perpetuity. In the case of several states, Congress has required, as a condition of their admission into the Union, that they agree not to tax for a period of years public land within the state sold by the United States. The proposed state constitution, as framed by a territory, has sometimes been unsatisfactory in certain respects to Congress or to the President, who is associated with that body in the act of admission, and the territory has been required to amend the instrument so as to meet these objections. Thus, the first draft of the constitution of Arizona provided for the recall of elected officials, including judges. President Taft vetoed the resolution providing for the admission of the state with this constitutional provision, and she was required to amend her constitution by excepting judges from the operation of the recall before she was finally admitted in 1912. Very shortly after her admission, however, she again amended her constitution and reinstated the provision for recall of judges.

In providing, after becoming a state, for the recall of judges in spite of the restriction placed upon her admission, Arizona was acting within her constitutional rights. Upon admission into the Union, a state becomes a member of a society of equals. This principle is illustrated by the case of Oklahoma, which was admitted in 1907 upon condition that the state capital should be located at Guthrie and should not be changed for a period of years. Prior to the expiration of this length of time, the capital was removed by act of the state legislature to Oklahoma.

City, and the validity of the act was upheld by the Supreme Court of the United States.<sup>7</sup> The Court held that "the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized." That court, however, has held restrictions laid by Congress upon the admission of states to be valid when they restrain their legislative power over the federal public lands. The Court upheld the validity of such a condition in the act admitting Minnesota into the Union. The distinction between such a condition and one on the political rights and privileges of a state was stated by the court as follows:

A state admitted into the Union enters therein in full equality with the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the nation or with any other state in reference to such property.<sup>8</sup>

### **Constitutional Rights and Obligations of the States as Members of the Union**

Neither the state government nor the national government is a complete government in all respects, but each is dependent to a certain extent upon the other for the performance of several essential functions. The national government was established through the ratification of the Constitution by conventions assembled in the several states, which represented not the people of the country *en masse*, but the people by states. One of the principal compromises adopted by the National Convention of 1787 was that which settled the conflicting claims of the large and small states by giving equal representation to the states in the senate and representation according to population in the house of representatives. Prior to the adoption of the Seventeenth Amendment in 1913, United States senators were chosen by state legislatures, and, although they are now popularly elected, the equal representation of states is a recognition of the

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<sup>7</sup> *Coyle v. Smith*, 221 U. S. 559 (1911).

<sup>8</sup> *Stearns v. Minnesota*, 179 U. S. 223 (1900).

federal principle.<sup>9</sup> Members of the lower house of Congress are now elected, as a rule, from districts into which each state is divided by the state legislature. In case the population of a state is so small that it is entitled to only one representative, such representative is, of course, elected by the people of the state at large. A representative may also be elected at large when the number of members to which a state is entitled has been increased but the legislature has failed to redivide the state into a larger number of congressional districts. Although Congress has required by law that the districts shall be composed of compact and contiguous territory and shall contain as nearly as practicable an equal number of inhabitants, there is still room within these limits in which the legislature may very effectively gerrymander the state in the interests of the party in power.<sup>10</sup>

The states are also the election districts for the choosing of the President of the United States. He is legally chosen by a college composed of electors, of whom each state has as many as it has senators and representatives in Congress. These electors are state officers and are chosen in such manner as the state legislature may determine. They meet in separate groups by states at their respective state capitals for the purpose of casting their votes for President. If no person has a majority of the votes cast for President, the house of representatives, voting by states (each state delegation having one vote), chooses the President from the highest three names on the list. In practice, on account of the unforeseen development of political parties, the President is nominated by party conventions, composed of delegates from each state, and is in reality elected by popular vote. He is elected, however, not by the people of the whole country voting *en masse*, but by the people voting by

<sup>9</sup> On the power of the states over the process of nominating senators and representatives in Congress, see *Newberry v. United States*, 256 U. S. 232 (1921), and *cf. dictum in State v. Howell*, 175 Pac. 569 (1918).

<sup>10</sup> The New York court of appeals has held that the state legislature has the power and rests under the duty of redistricting the state not only after each Federal decennial census, but at any other time when the shifting of population may render it advisable. *People v. Voorhis*, 119 N. E. 106 (1918). This, however, hardly seems to have been in accordance with the intention of Congress.

states, so that it is possible for a President to be elected who has received a mere minority of the popular votes, or even fewer popular votes than has some other candidate, and this has sometimes happened.

The federal principle is further recognized in the process of amending the Constitution of the United States. Popular control is not directly exerted over the adoption of amendments at any stage, but the states are given great weight in the process. Amendments have always been proposed by a two-thirds vote in each house of Congress and have become a part of the Constitution when ratified by three-fourths of the state legislatures. It would be possible for the seventeen least populous states, through their representatives in the United States Senate, to prevent Congress from proposing an amendment and for the thirteen least populous states to block the ratification of an amendment, although their total combined population is less than that of the one most populous state. Although such a division between states has not actually happened, the possibility that it might happen is an evidence of the weight given to the states as governmental units in the amending process.<sup>11</sup>

It is provided in the Federal Constitution that the United States shall guarantee to every state a republican form of government. Although this provision is couched in the form of a right accorded to the states, it may also operate as a limitation upon the states to prevent them from maintaining any other than a republican form of government. The Constitution does not define what is meant by a republican form of government, but it can be safely assumed that the national government and the state governments existing at the time of its establishment

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<sup>11</sup> The supreme court of Maine, in an advisory opinion, has held that the state legislature, in ratifying an amendment to the Federal Constitution, is acting as the agent of the national government for this special purpose, as distinguished from its function in determining the method of choosing presidential electors, in which case it acts without interference or control on the part of the national government. *In re Opinion of the Justices*, 107 Atl. 705 (1919). The Supreme Court of the United States has held that the action of state legislatures in ratifying an amendment to the Constitution is not subject to the invocation of the popular referendum. *Hawke v. Smith*, 253 U. S. 221 (1920).

were considered to be republican in form. Furthermore, it appears from contemporaneous writings<sup>12</sup> that this guarantee was intended to insure a representative form of government in the states, as distinguished from a monarchy on the one hand or a pure democracy on the other. The power of determining in any given case whether a state has a republican form of government is one to be exercised not by the courts but by the political departments of the national government.<sup>12a</sup> This enables Congress to exercise a censorship over the form of government in a state by refusing to admit senators and representatives therefrom until certain governmental changes are made. Thus, during the reconstruction period after the Civil War, Congress refused to readmit the representatives of the ex-Confederate states to their seats until they had amended their constitutions so as not to discriminate against persons in the matter of voting on the ground of race or color, and had ratified the fourteenth and fifteenth amendments to the Constitution of the United States. In taking this action, however, Congress undoubtedly stretched its power under the "guaranty" provision far beyond the intention of the framers of the Constitution.<sup>13</sup>

The power of Congress under this section of the Constitution, however, is not confined to a mere passive refusal to receive senators and representatives from a state whose government it deems not to be republican in form, but it could go farther and take positive action, or confer upon the President power to take positive action, to enforce the guarantee. This might become necessary particularly in the case where there exist in a state two rival governments, each claiming to be the true government. In such circumstances, Congress would have to decide which is the established government in a state before determining whether it is republican in form. The forcible intervention of the national government might be necessary in case of armed conflict between two contending governments in a state. In 1841, Dorr's Rebellion broke out against the gov-

<sup>12</sup> James Madison in the *Federalist*, Nos. 10, 14, 39.

<sup>12a</sup> *Pacific States Telephone and Telegraph Co. v. State of Oregon*, 223 U. S. 118 (1912).

<sup>13</sup> Cf. W. W. Willoughby, *The American Constitutional System*, p. 120.

ernment of Rhode Island, which was still operating in the main under its old colonial charter. The President of the United States, upon application of the governor of the charter government, recognized that government as the legally established government of the state, and threatened to call out the militia to support its authority. As the result of this threat, the rebellion collapsed.<sup>14</sup>

In protecting a state against mere domestic violence, the United States Government waits for application from the proper state authority. This proper state authority is the governor, provided the legislature is not in session and cannot be convened. The policy of the United States Government has generally been not to intervene in cases of domestic violence unless the need is clear, or unless the application is made by the proper authority. On the other hand, if the interference is for the purpose of enforcing the laws of the United States, for preventing interference with the movement of the mails, or for compelling respect for the processes of the Federal courts, as in the case of the Chicago railroad strike in 1894, the national government not only need not wait for application from the state, but may intervene for that purpose even against the protest of the governor.<sup>15</sup> A state has a right to have its territorial integrity respected and, as we have seen, it cannot be divided without the consent of its state legislature. In case its safety or territorial integrity is threatened by foreign invasion, such an invasion would at the same time be an invasion of the United States, and it would be the duty of the United States Government to furnish protection to the state against such invasion. This would be all the more necessary since the states are prohibited, without the consent of Congress, from keeping troops or ships of war in time of peace.

### State and National Coöperation

As the Supreme Court of the United States has observed, there are but few of the articles of the Constitution which "could be carried into practical effect without the existence of the

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<sup>14</sup> *Luther v. Borden*, 7 How. 1 (1849).

<sup>15</sup> *In re Debs*, 158 U. S. 564 (1895).

states."<sup>16</sup> There are many circumstances in which coöperation between the state and national governments is necessary or desirable for the accomplishment of objects of common concern. The Constitution of the United States is a constitution not only for the national government but also for the states in so far as it applies to them, and the judges in every state are specifically declared to be bound thereby as well as by national laws and treaties.<sup>17</sup> The state courts are often called upon to interpret, apply, and enforce the constitution and laws of the United States, both judicially and administratively. Thus state courts may naturalize aliens; they may condemn land for national purposes; state officials may arrest persons accused of Federal offenses, and, before the Civil War, they assisted in the return of fugitive slaves.<sup>18</sup> It has been held that rights arising under an act of Congress imposing certain liabilities upon interstate railroads for injuries to their employees may be enforced in the state courts when their jurisdiction, as prescribed by state law, is adequate to the occasion.<sup>19</sup>

The state and national governments frequently coöperate with each other in the enforcement of their respective laws. Thus,

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<sup>16</sup> *The Collector v. Day*, 11 Wall. 113 (1871). For a statement of the numerous points of contact of the national and state governments and of the frequent dependence of the former upon the latter, see opinion of Justice McReynolds in *Newberry v. United States*, 256 U. S. 232 (1921).

<sup>17</sup> In *Claflin v. Houseman*, 93 U. S. 130, the court declared that "the laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty."

<sup>18</sup> *Prigg v. Pennsylvania*, 16 Pet. 539 (1842).

<sup>19</sup> *Second Employers' Liability Case*, 223 U. S. 1 (1912). In this case the court quoted from its opinion in *Claflin v. Houseman*, cited *supra*, as follows: "If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject, also, to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system for jurisprudence, which constitutes the law of the land for the state."



the several states have enacted laws penalizing the counterfeiting of United States coin. Again, although not strictly a matter of coöperation, it may be mentioned that, under the concurrent power granted them, the several states have enacted laws for the enforcement of the eighteenth amendment to the Constitution of the United States. The standard or test of intoxicating liquor laid down in state laws may differ from, or be the same as, that employed in the enforcement legislation of Congress.<sup>20</sup> During time of war, state coöperation in the enforcement of national law becomes especially active. At such a time, the states, as parts of the nation, owe it full and loyal support by assisting in all lawful ways in bringing the war to a successful conclusion. State governors have acted as the agents of the national government in recruiting troops and in assisting in the enforcement of the draft acts of Congress by appointing draft commissioners in the various counties of the state.<sup>21</sup> Under the national conscription act of 1917, the states were granted and exercised authority to assist in its enforcement. In many states, laws were passed at the outbreak of the war with Germany making it unlawful for any person to discourage enlistment in the national forces or to incite hostility towards the United States Government.<sup>22</sup> Even before the declaration of a state of war with Germany, councils of defense or similar bodies had been created in some states. Immediately upon the issuance of the declaration, the Council of National Defense established a department to coördinate the state defense activities throughout the nation. This department later de-

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<sup>20</sup> Cf. *In re* Opinion of the Justices (of Massachusetts), 133 N. E. 453 (1921). The states cannot be legally compelled to exercise their concurrent power under this Amendment, nor be prevented from repealing their enforcement legislation, as was done by New York in 1923.

<sup>21</sup> *Druceker v. Salomon*, 21 Wis. 621 (1867). In 1902, the United States Treasury Department issued warrants in favor of the states of Illinois, Indiana, Iowa, Michigan, Vermont and Ohio, aggregating over \$3,000,000, to cover claims by the comptroller of the treasury for expenses incurred by these states incident to the raising and equipping of troops during the Civil War. *Chicago Tribune*, July 3, 1902, p. 2, col. 3.

<sup>22</sup> These laws were generally upheld as constitutional. *State v. Holm*, 166 N. W. 181 (1918); *State v. Tachin*, 106 Atl. 145 (1919). But, *per contra*, see *Ex parte Meckel*, 220 S. W. 81 (1919).

veloped into the section on coöperation with states. In May, 1917, a conference of the states called by the national council was held at Washington, attended by representatives from every state. Within two months after the conference, state councils of defense had been organized in every state. These councils were given broad powers in some states in taking measures for the encouragement of military training and for the protection of life, property, and public safety, subject to the superior control of national administrative authorities. The state councils were of considerable assistance in promoting various activities incident to the prosecution of the war and in coöperating with the national council.<sup>23</sup>

Nevertheless, it should not be forgotten that the Government of the United States, unlike the central governments of some of the European states which have the Federal system and unlike the old government of the Confederation, possesses, for the most part, its own machinery and its own body of officials for the execution of Federal law and rarely relies upon the state governments or state officials for this purpose. This duplication of machinery and of personnel with its resulting expense has sometimes been criticized as one of the defects of the American federal system, but, as experience during the period of the Confederation abundantly showed, it is the more effective means of insuring the execution of Federal law and the performance of the services undertaken by the national government.

The activities of the organs of the national government may have an influence upon the enforcement of state law. Such influence may be exerted either by way of impeding or of facilitating the enforcement of state law. The former result may be obtained, for example, through application or petition made to the Federal courts for an injunction restraining the enforcement or execution of a state statute, by restraining the action of a state officer or administrative board, on the ground that the state statute, under color of whose authority the state officers are acting, is in violation of some provision of the Constitution

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<sup>23</sup> J. M. Mathews, "State Councils of Defense," *American Political Science Review*, August, 1918, pp. 509, 510.

of the United States. If a temporary injunction is granted, but is subsequently dissolved because the contention of the petitioners cannot be sustained, the result is that the enforcement of state law has been at least temporarily impeded through the action of the Federal courts.

For the most part, however, the influence of the activities of national organs or agents is in the direction of facilitating or assisting in the enforcement of state law. Such influence may be exerted either directly or indirectly. Thus, Federal aid may be brought directly to the assistance of a state in putting down domestic violence within its borders, upon application of the proper state authority. Again, a particular act may be at the same time a violation of both state and Federal law. Under these circumstances, the activity of the Federal authorities in preventing or punishing the commission of such act has the collateral effect of enforcing the state law. Thus, frauds at elections may, under certain circumstances, be a violation of both state and Federal law. Where the persons accused of such violations have local political influence, prosecutions in the Federal courts are more likely to be successful than in state courts.<sup>24</sup> Similarly, the seizure by the Federal authorities of the books and papers of persons accused of fraudulent use of the mails may assist in the enforcement of state "blue sky" and other laws.

The efforts of state authorities in enforcing state law may be assisted through the practical coöperation of Federal authorities and bureaus. Thus, the United States Public Health Service and the Bureau of Animal Industry at Washington may assist the proper state authorities in enforcing state laws for the protection of the public health or in stamping out epidemics. Again, the statistical data, collected by Federal authorities in the enforcement of Federal law, may be utilized by state authorities in the enforcement of state law. Thus, the enforcement of the state laws regarding the collection of an income tax and the regulation of railroads may "lean up" against the returns received under the Federal income tax law or by the Interstate

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<sup>24</sup> Cf. *Ex parte Siebold*, 100 U. S. 371 (1880), upholding the conviction of certain state election judges for stuffing the ballot box at a Congressional election.

Commerce Commission. In this connection, it may also be noted that, in some states, the mere possession of an internal revenue receipt from the United States Government is declared to be *prima facie* evidence of an offense against state law. The so-called "interstate criminals," such as the operators of syndicated bucket shops in different states, are more easily reached by Federal than by state authority.

An important aspect of Federal influence upon the enforcement of state law is in connection with the use and sale, within a state, of articles which pass through the channels of interstate commerce or are subject to Federal internal revenue taxes. Thus, antinarcotic laws, though found on the statute books of a majority of the states, were comparatively ineffective until the enactment of the Federal antinarcotic law of 1914, known as the Harrison Law. Again, under the Lacey Game Law passed by Congress it is made unlawful to transport into any state game which has been killed or shipped in violation of state law. Prior to the adoption of the Eighteenth Amendment to the Constitution of the United States, national power was exerted over the regulation of interstate commerce to assist in the enforcement of state antiliquor laws. Thus, under the Wilson Original Package Act of 1890, all intoxicating liquor transported into any state was made, upon its arrival, subject to the operation of the laws of such state enacted in the exercise of its police powers.<sup>25</sup> In 1902 the same rule was applied to the transportation of oleomargarine, butterine, and other articles of interstate commerce.<sup>26</sup> The Webb-Kenyon Act of 1913 prohibited the shipment from one state into another of intoxicating liquor intended to be used in any manner in violation of state law.<sup>27</sup>

<sup>25</sup> 26 U. S. St. at L. 313.

<sup>26</sup> 32 U. S. St. at L. 193.

<sup>27</sup> 37 U. S. St. at L. 699. Through various other activities the Federal authorities may incidentally assist in the enforcement of state law. Thus, the Federal courts, in the exercise of their jurisdiction in bankruptcy matters, may assist in the enforcement of the state law against the sale of liquor on Sunday. A number of saloons which were owned and operated by a brewing company in Chicago were kept closed on Sunday in accordance with state law, during the period of a receivership which resulted from bankruptcy proceedings in the Federal District Court. The Federal courts may also exert some indirect influence upon the enforce-

### Interstate Relations

The general principle governing the relations between the states is that they are foreign to each other except as this condition is modified by provisions of the Constitution of the United States. Such a provision is that which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This provision was intended to prevent unreasonable discrimination by one state against the citizens of another state with reference to the enjoyment of ordinary civil rights or privileges. Thus, if a citizen of Ohio owns land situated in Indiana, the latter state cannot levy a tax on it at a higher rate than it taxes land of its own citizens merely because it is owned by a nonresident. To the operation of this interstate comity clause, however, certain exceptions should be noted. In the first place, it does not protect corporations, which, although persons, are not citizens within the meaning of the word as used in this clause.<sup>28</sup> Consequently, this clause does not prevent a state from levying a tax upon the business of foreign insurance companies at a higher rate than upon the business of domestic companies. Again this clause does not entitle a citizen of one state to the immediate exercise of political rights, such as the suffrage, in another state without undergoing the required period of residence.<sup>29</sup> Furthermore, it has been held that the exercise of rights which may deplete the natural resources of a state, such as fish and game, may be restricted to the citizens of such state.<sup>30</sup> Finally, this clause does not mean that a citizen of one state may go into another state and claim the right to engage in the practice of a profession when, under the law of that state, he is not eligible, although he may be so in the state from which he comes. In general,

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ment of the state Sunday closing law by denying citizenship to alien applicants operating saloons in violation of such law, or by canceling the citizenship certificates of saloonkeepers who obtained naturalization papers upon the strength of false statements that they had not violated such law.

<sup>28</sup> *Paul v. Virginia*, 8 Wall. 168 (1869).

<sup>29</sup> *Blake v. McClung*, 172 U. S. 239 (1898).

<sup>30</sup> *Corfield v. Coryell*, Fed. Cas. No. 3230 (1825).

however, whatever privileges and immunities a state allows to its own citizens it must allow to the citizens of other states on the same terms and subject to the same conditions.

In the absence of treaty stipulation, there is no legal requirement that the state or federal courts of the United States shall give full faith and credit to the judgments of courts of foreign countries, although this may be done as a matter of international comity. The states, however, are required by the Constitution to give full faith and credit to the public acts, records, and judicial proceedings of every other state. This does not mean that legislative acts, judicial decisions or other official acts of one state shall have extra-territorial effect in another state, but rather that they shall be recognized as conclusive evidence of the facts of the case, without the necessity for a retrial of the case upon its merits.

The real effect of the constitutional provision is thus to establish a binding rule of evidence, rather than one of jurisdiction.<sup>81</sup>

Although the states are absolutely prohibited by the Constitution from entering into any treaty, alliance, or confederation, they are allowed, with the consent of Congress, to enter into agreements or compacts with each other or with foreign powers. This provision would prevent the states from forming any combination designed to increase their political power, although they may enter into certain kinds of commercial agreements or business contracts and understandings without the consent of Congress. Such consent, for example, would not be necessary for a state to buy land within its boundaries which happened to be owned by another state.<sup>82</sup> Nations sometimes undertake to settle controversies between themselves either by war or by entering into treaties of arbitration. In the case of controversies between states of the Union, however, such methods are impossible as well as unnecessary, since the Supreme Court of the United States is given jurisdiction over controversies between states. A number of such suits have been brought regarding boundary disputes, rights in public waters,

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<sup>81</sup> W. W. Willoughby, *The American Constitutional System*, p. 275.

<sup>82</sup> *Virginia v. Tennessee*, 148 U. S. 503 (1892).

and other matters. In hearing and determining such cases, the function of the court has some similarity to that of an international tribunal, but the analogy is not perfect, since a state cannot refuse to recognize the jurisdiction of the court.

Foreign nations usually have with each other treaties providing for the extradition of fugitives from justice. Such treaties between states of the Union, however, would be unnecessary, even if possible, since the Constitution of the United States provides that such fugitive shall be delivered up on demand of the executive authority of the state from which he fled. But that instrument fails to state upon what authority the demand shall be made, and thus no obligation is specifically placed upon any particular state officer to comply with such demand. Congress has attempted to supply this omission in the Constitution by providing that it shall be the duty of the executive authority of the state to comply with the demand by causing the arrest of the fugitive and his delivery to the agent of the demanding state. The words "it shall be the duty," however, have been construed to be merely "declaratory of a moral duty," and the writ of mandamus will not lie to compel compliance with the demand.<sup>83</sup> The governor upon whom the demand is made may therefore refuse to issue a warrant for the arrest of the fugitive or an order for his surrender to the agent of the demanding state, for whatever reasons seem to him good and sufficient. On the other hand, the legality of the governor's action in issuing the warrant may be the subject of judicial inquiry in habeas corpus proceedings, although the governor determines in the first instance whether the demand is in compliance with the law, and whether the person whose return is sought is a fugitive from justice.<sup>84</sup> Among the reasons for which governors have refused to grant extradition are that the alleged offense is not a crime in the state to which the fugitive has escaped, or that the fugitive would probably not receive a fair trial in the demanding state, or, perhaps, mere

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<sup>83</sup> *Kentucky v. Dennison*, 24 How. 66.

<sup>84</sup> *Ex parte Owen*, 136 Pac. 197 (Okla. 1913); on the governor's power of extradition, see, also, *Ex parte Thaw*, 214 Fed. 423; *Ex parte Pettibone* and *Ex parte Moyer*, 12 Ida. 246, 250.

personal hostility between governors. If, in spite of the refusal of the governor to extradite, the fugitive is brought back into the demanding state by force or a ruse, he is then within the jurisdiction of the demanding state and may be tried just as if he had been regularly extradited. Again, whether regularly extradited or not, if once brought within the jurisdiction of the demanding state, he may be there tried for offenses other than that for which his extradition was demanded.

The states may coöperate with each other in various ways for the accomplishment of common purposes. Thus, various state officers such as attorneys-general, insurance commissioners, or fire marshals may meet together to discuss matters of common interest. Especially noteworthy in this connection is the Conference of Governors, which first met in 1908 upon the call of President Roosevelt for the purpose of considering the question of the conservation of natural resources. Annual Conferences have since been held, attended by governors, governors-elect and ex-governors, for the consideration of various questions of common interest to the states. The Conference was originally hailed with enthusiasm as a body which, though entirely extra-constitutional, would prove to be an important influence in increasing the efficiency of the state governments, bringing about greater uniformity of state action, and acting as a bar against the encroachments of centralization and "New Nationalism." Unfortunately, these high hopes have not been fully realized. Uniformity of legislation was one of the original objects of the Conference. In this direction it has effected some improvement in state divorce laws, but, on the whole, much less has been accomplished by it in promoting uniformity of legislation than by the American Bar Association and the Commission on Uniform State Laws. In the direction of defending the states against the encroachments of national centralization, the Conference has done little except to exert some influence on the Supreme Court of the United States in the Minnesota Rate case.

The comparative failure of the Governors' Conference appears to be due partly to the short terms of most governors and the consequent changing of membership of the Conference



and lack of sustained interest in the proceedings, partly to the social and unbusinesslike character of the poorly attended meetings, but more particularly to the lack of the proper sort of a permanent and efficient central organization. The Conference has now cut loose from the guidance of the national authority and has the nucleus of a central organization in its continuing secretary, but his functions consist principally in arranging for the annual meetings and in editing the annual volume of *Proceedings*. The central organization should have sufficient financial support so that it might be of use to the governors all the year round in serving as a national clearing-house of information regarding important matters of legislation, court decisions, and administrative action in the various states. In spite of the apparent paucity of positive results, however, the intangible value of the Conference may be underestimated. It should prove to be a useful adjunct in the consideration of the workings of the state governments, even if it fulfills no other function than serving as a means for the interchange of views and ideas and of information regarding the results of state experience.

### The States and Foreign Relations <sup>85</sup>

The experience secured under the Articles of Confederation led to the placing in the Constitution of strict limitations upon the power of the states in connection with foreign relations. They are absolutely prohibited from making treaties; and treaties made under the authority of the United States are declared to be the supreme law of the land, notwithstanding anything to the contrary in the laws of any state. Moreover, the states are prohibited, without the consent of Congress, from entering into any agreement or compact with a foreign power and from engaging in war, unless in imminent danger of invasion.

The governor of a state from which a fugitive from justice has fled to a foreign country must ordinarily act through the Secretary of State at Washington in demanding from such government the return of the fugitive in accordance with extra-

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<sup>85</sup> This section is summarized from the author's article by the same title in *Michigan Law Review*, May, 1921, pp. 690-697.

dition treaties between the two countries. The situation would doubtless be altered, however, where there are acts of Congress or treaties of the United States expressly authorizing extradition proceedings to be conducted by the governor of the state directly with the authorities of the foreign government. Thus, by our treaty of 1861 with Mexico, the chief executives of the border states and territories were authorized to make requisitions and to grant extradition in certain cases. In such cases, it may be said that the chief executive of the state is acting primarily as the agent of the United States Government.

A method by which a state may indirectly influence foreign relations is through the taking of action which may purport to affect the status of aliens residing in such state, or through its failure to take action for their protection in the exercise of rights which they claim under treaties. This situation is thus described in a Senate document relating to the power of recognition:

A state of the Union, although having admittedly no power whatever in foreign relations, may take action uncontrollable by the Federal Government, and which, if not properly a *casus belli*, might nevertheless as a practical matter afford to some foreign nation the excuse of a declaration of war. We may instance the action which might have been taken by the state of Wyoming in relation to the Chinese massacres, or the state of Louisiana in relation to the Italian lynchings, or by the state of New York in its recent controversy with German insurance companies with relation to the treatment of its own insurance companies by Germany.<sup>80</sup>

As to whether the action of the states in such matters is, in all cases, uncontrollable by the Federal Government, there may be some question, but, judging by the number of instances in which the nation has been embroiled in international difficulties by the action or nonaction of the states, it would seem that no effective means of preventing such action has yet been devised. Some of the difficulties encountered have been due to the lack of protection afforded aliens by the states against individual or mob violence and the lack of means of redress afforded against such injuries. Congress could probably constitutionally provide

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<sup>80</sup> U. S. Senate doc. 56, 54th Cong., 2nd sess., p. 5.

such means of redress through Federal agencies, but has thus far failed to do so.<sup>87</sup> Other difficulties arise from the passage of acts or ordinances by states or municipalities which discriminate or are alleged to discriminate against aliens in violation of their treaty rights. Among these are labor laws, land laws, and those regulating the privilege of attending the public schools. Some of these, as enacted in various states, have been declared unconstitutional by the courts as in violation of treaty provisions. Probably the most conspicuous of the state laws and local ordinances which have given rise to international difficulties are the San Francisco school ordinance and the California alien land law, aimed at aliens ineligible to citizenship. The public sentiment in that state on the matter is forcibly indicated by the adoption in 1920 through the popular initiative by a vote of three to one of an alien land law, against which Japan is said to have protested as in violation of treaty rights.<sup>88</sup>

In general, however, it is true that, for all practical purposes, the direct contact of the state governments with foreign governments is, under the Constitution, reduced to a negligible quantity. The general doctrine on this matter has been laid down by the Supreme Court in a number of cases. Thus, in the *Arjona*

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<sup>87</sup> *Baldwin v. Franks*, 120 U. S. 678.

<sup>88</sup> This law, together with a similar law of Washington, has recently been upheld by the Supreme Court of the United States as not unconstitutional. *Terrace v. Thompson*, *Webb v. O'Brien*; *Porterfield v. Webb*, 44 Sup. Ct. Rep. 112 (decided, November, 1923). These cases involved certain contracts of lease of agricultural land and cropping contracts attempted to be entered into by American citizens who owned the land with Japanese citizens as tenants. The court held these contracts to convey such an interest in the land as was prohibited by the state laws from being transferred to aliens ineligible for citizenship. The court held that the laws were a violation neither of the treaty with Japan nor of the Fourteenth Amendment to the Constitution of the United States. In an earlier case (*Truax v. Raich*, 239 U. S. 33), an Arizona law limiting the right of aliens to engage in ordinary employments had been held invalid, but in the instant cases the court distinguished the earlier case on the ground that an interest in land falls within a different category from that of engaging in ordinary commercial occupations. The court further held that the classification of aliens in the naturalization law of Congress furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership, and that the state may include nondeclarant eligible aliens and ineligible aliens in the same prohibited class.

case, wherein was upheld a Federal statute punishing the counterfeiting in the United States of the securities of foreign nations, the Court said: "The Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. . . . Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States."<sup>39</sup> Again, in the Chinese exclusion case, the Court says: "For local interests, the several states of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."<sup>40</sup> The same principle is thus stated by the Court in the *Legal Tender* case:

The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments.<sup>41</sup>

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<sup>39</sup> *United States v. Arjona*, 120 U. S. 479.

<sup>40</sup> *Chae Chan Ping v. United States*, 130 U. S. 581, 606. Cf. *Fong Yue Ting v. United States*, 149 U. S. 698.

<sup>41</sup> *Knox v. Lee*, 12 Wall. 457, 555.

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## CHAPTER II

### THE STATE CONSTITUTION

UPON admission into the Union, each state has the power to frame its own constitution and to insert therein such provisions as it sees fit, provided they do not, either singly or collectively, violate any of the provisions of the Constitution of the United States. A state may retain in its constitution as a matter of sentiment or mere neglect a provision which runs counter to the Constitution of the United States, but of course such provision has no legal force. Thus, the constitutions of Ohio and Oregon still expressly restrict the right to vote to white persons, although such provisions have been void since the adoption of the Fifteenth Amendment in 1870. Many state constitutions still expressly restrict the right to vote to males and have not been formally amended so as to conform with the Nineteenth or Woman Suffrage Amendment of 1920. Such action, however, is legally unnecessary, since the Constitution of the United States automatically sets aside any provisions of state constitutions with which it conflicts. This result is produced by that provision of the former instrument which declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Whenever, therefore, a case arises in court involving a conflict between the constitution or laws of the United States and the constitution or laws of any state, it is the duty of the court, whether state or federal, to refuse to enforce the constitution or laws of the state. A state constitution is legally in no better position than a state statute in this respect. Nevertheless, in cases where the incompatibility between federal and state law is not clear, the courts are usually inclined to accord greater respect to the provisions of a state

constitution alleged to be in conflict with the Constitution or laws of the United States than they would to a state statute similarly attacked. In cases in which such an incompatibility is alleged in a state court so as to raise a "Federal question," an appeal may be taken to the Supreme Court of the United States, which is the final arbiter of the question. Since the latter tribunal is an organ of the national government, it is naturally inclined to construe the respective powers of the national government and the states under the Constitution in favor of the extension of national power and a corresponding delimitation of state power.

### The Original State Constitutions

The constitutions of the original states were derived, in the main, from their colonial charters, and, in the cases of Connecticut and Rhode Island, these early instruments of government were made to serve as constitutions, with slight changes, until as late as 1818 and 1842, respectively. At the suggestion of the Second Continental Congress, the other original states drew up new constitutions during the period from 1776 to 1780. These were among the earliest genuine written constitutions, and the distinction between constitutional law and ordinary legislation was not so well understood at that time as it has since become. Hence, the method of adopting constitutions was not in most cases as sharply distinguished from that of passing ordinary statutes. A constitution has been defined by Bryce as a comprehensive, fundamental law or body of laws, directly enacted by the people of the state and capable of repeal or alteration, not by representatives but only by the people. However suitable this definition might be as applied to recent constitutions, it would not conform in most cases to the practice followed in adopting the first state constitutions. Massachusetts was the only state which, down to 1780, drew up the constitution in a convention specially chosen for the purpose and made its adoption contingent upon popular ratification, although New Hampshire followed the same plan in her second constitution of 1784. In the other states the constitutions were drawn up either by the regular legislatures or by irregular assemblages

and put into effect without popular ratification. This was due in part to a lack of confidence among the leading men of that time in the political capacity of the people to pass intelligently upon such complicated questions of government as well as to their lack of full appreciation of the distinction between constitutional and ordinary law. The first half of the nineteenth century, however, saw a very striking change in both these respects.

### Development of State Constitutions

During the first half of the nineteenth century, the conception of a constitution as a fundamental law resting upon the direct authority of the people became firmly established, and the practice therefore became almost universal of submitting proposed constitutions and constitutional amendments to popular ratification. This was merely one phase of the democratic wave, which also brought about a widening of the suffrage and the election of members of all three departments of government by popular vote. Concomitantly with this movement there developed an increasing lack of popular confidence in the state legislatures, which manifested itself in the insertion in the constitutions of numerous limitations upon these bodies. After the Civil War, the enlarged scope of administrative activity by the states led to the inclusion in the constitutions of many administrative details. Thus, the Alabama constitution of 1901 contains a provision regarding the method of letting contracts for furnishing printing, stationery and fuel to state departments. The principle of separation of powers is generally laid down in state constitutions and is applied by the courts as a rule of law except in so far as express exceptions are made to it in the constitutions themselves. In a few states, such as Virginia and Oklahoma, the need for creating administrative bodies with broad powers has led to the inclusion of provisions for such bodies in the constitutions. In these various ways the length of state constitutions has been greatly increased as compared with those of the revolutionary period. Many of the more recent constitutions are so long as to form veritable codes of law. Moreover, their contents are ill-organized, permanent provisions relating to the



framework of government being mixed with administrative detail in confusing array. Naturally, many of the provisions now found in these instruments embody mere statutory matter, and are constitutional not in the material sense, but merely in the formal sense. When provisions have once become embodied in constitutions of the older states, many of them are likely to be copied into those of the newer states. Such copying is not slavish as a rule, although in some cases institutions have been adopted in one state after having proved unsatisfactory in the older state from which copied, and occasionally provisions have been copied which were manifestly unsuited to the conditions found in the copying state.

### Contents of State Constitutions

A thoroughly satisfactory classification of the contents of state constitutions would be difficult to make, but the following may serve for practical purposes: (1) the bill of rights; (2) provisions relating to the framework of government, including the division of powers among the three usual departments, and the extent of their competence; (3) administrative provisions, including those dealing with the economic, industrial, social, financial, cultural, developmental and repressive functions of the state; and (4) provisions for the revision and amendment of the constitution. In addition to the above, there is also usually found a schedule, which may be omitted from further consideration, since it consists merely of temporary provisions designed to bridge over the transition from the old constitution to the new.

### The Bill of Rights

In order to protect the rights of the individual against arbitrary or oppressive action by the government, it has been deemed wise to insert in the constitutions various fundamental guarantees of individual liberty. The bills of rights also frequently contain general theoretical statements regarding the natural rights of man, drawn from French political philosophy of the revolutionary period. The doctrine of inherent natural rights is now exploded, and such statements are of little or no prac-

tical value, although they are also probably harmless. The more practical and specific provisions of the bills of rights are derived from the principles and methods evolved in English constitutional history for the protection of individual liberty. Although these provisions have been modified to some extent within recent decades, they are still of practical importance as marking out a sphere of individual civil rights free from governmental interference. These provisions may be classified into those for the protection of (1) religious liberty; (2) freedom of speech and of the press; (3) rights of property; and (4) rights of persons accused of crime.

The provisions regarding religious liberty allow each person to worship according to the dictates of his own conscience, provided such liberty does not degenerate into license nor lead to the commission of illegal acts. Church and state are separate, so that there is no established church, but religious institutions are recognized to the extent that property used exclusively for religious purposes is usually exempt from taxation. Positive aid, however, to institutions under sectarian control or management is usually prohibited, although the placing of inmates at public expense in sectarian institutions is frequently permitted.<sup>1</sup> The reading of the Bible in the public schools is also usually permitted, although in Illinois the courts have construed the bill of rights so as to prevent this.<sup>2</sup>

For the protection of freedom of speech and press, provision is made for the right of public meeting and discussion, and for petitioning the authorities for redress of grievances. Such freedom can be exercised, however, only within certain limits, since others have the right to reputation which would be violated by libelous or slanderous statements. Moreover, during time of war, limitations may be placed upon the full exercise of freedom of speech, which would not be tolerated during time of peace.

The property of individuals may be taken by the state, but

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<sup>1</sup> Cf. Constitution of Massachusetts, Art. XLVI (Amendment of 1917).

<sup>2</sup> *People ex rel. Ring v. Board of Education*, 245 Ill. 334 (1910). The proposed constitution of 1922 contained a provision, designed to overcome this decision, allowing the reading of selections from any versions of the old and new Testaments without comment (Sect. 3).:

only in accordance with due process of law.<sup>3</sup> It may also be taken under the power of eminent domain, but in this case just compensation is required to be given. Further provisions for the protection of property include those prohibiting unreasonable searches and seizures and the quartering of soldiers in private houses during time of peace.

Many of the provisions of the bills of rights are necessary and proper, especially as limitations on legislative action, since the general rule is that the powers of the legislature are unlimited except as limits are found in the Federal or state constitution. The first eight amendments of the Federal Constitution contain a bill of rights, but the provisions of these amendments are limitations only on the Federal government and not on the states. There are, however, limitations on the states in other parts of the Federal Constitution, especially in the first section of the Fourteenth Amendment, prohibiting the states from depriving any person of life, liberty or property without due process of law. This amendment thus duplicates to some extent the provisions of state bills of rights, and the latter have consequently become less essential since its adoption. In fact, it would probably be better now to eliminate the due process clauses in state bills of rights in order to avoid the variety of interpretations placed by state courts upon these clauses, and to secure the greater uniformity resulting from the decisions of the Supreme Court of the United States.

### The Separation of Powers

It is the primary function of a constitution to set up the main organs of the government, to specify the relations between its different departments, and to delimit the sphere of their powers. The framework of state governments will be taken up in some detail in later chapters, but it is desirable at this time to mention briefly one of their general features.

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<sup>3</sup> State courts have sometimes adopted a reactionary attitude in their interpretation of the due-process clause of the bill of rights, and have stood in the way of needed social reforms. The meaning of due process, moreover, is vague and is determined largely by the varying social and political views of particular judges and courts.

The framers of the state constitutions have, from the very beginning, been greatly influenced by the doctrine of the separation of powers, which they derived from the writings of Montesquieu. This doctrine was part and parcel of the general principle of checks and balances, which they thought it necessary to apply to governments in order to prevent concentration of power and the resulting likelihood of tyrannical and arbitrary encroachment upon individual liberty. As Madison put it:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.<sup>4</sup>

The doctrine was embodied in a very pointed way in the provision of the Massachusetts Constitution of 1780 that "the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."<sup>5</sup> Provisions of similar import may be found in most of the other first state constitutions. In addition, other specific provisions are found designed to secure the independence of departments, such as that making the legislature the judge of the qualifications of its own members.

In order to prevent the merging of legislative and executive departments, the state constitutions still usually provide that no member of the legislature shall, at the same time, hold any lucrative office under the state. This prohibition was doubtless actuated by a fear of tyranny resulting from too much concentration of power and from a fear that the governor might exercise undue influence over the members of the general assembly by appointing or refusing to appoint them to public office. It prevents, however, the introduction in the state government of the parliamentary form of government found in certain foreign countries, in which the executive and legislative authori-

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<sup>4</sup> The *Federalist*, No. 47.

<sup>5</sup> Thorpe, *Constitutions*, p. 1893.

ties are merged. In order to remove this limitation upon freedom of action in adopting whatever form of government may be best suited to the needs of the people, it has been proposed that the constitution be amended so as to allow the governor to appoint the heads of executive departments from among the members of the general assembly, but this change has not yet been made.

The doctrine of the separation of powers was thus accepted as a fundamental political maxim of government by the framers of the first state constitutions, and it has also been adopted as a rule of American public law which is enforced by the courts, except in so far as express exceptions may be made to it in the constitutions themselves.<sup>6</sup> Thus, the doctrine prevents the legislature from exercising a judicial power, such as passing an act granting an individual a new trial in a particular case decided by a court.<sup>7</sup> On the other hand, it prevents the legislature from requiring the courts to exercise a power not judicial in its nature, such as adopting a location for street railway tracks.<sup>8</sup> Again, it prevents the legislature from merging in the hands of the same body legislative, executive, and judicial powers.<sup>9</sup> Such a combination of powers might, however, be provided for in the state constitution, and this has been done in some states, as in the case of the corporation commissions established by constitutional provision in Virginia and Oklahoma. Finally, the doctrine prevents the legislature from depriving any of the departments of government of any of their essential or inherent powers, such as the power of a court to punish summarily for contempt.<sup>10</sup>

The framers of the first state constitutions were sufficiently practical, however, to see that the doctrine of separation of powers could not be applied with absolute strictness, but that

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<sup>6</sup> This statement is limited to the state central governments, and does not apply to local government in counties and cities. *Fox v. McDonald*, 101 Ala. 51 (1892).

<sup>7</sup> *Merrill v. Sherburne*, 1 N. H. 199 (1818). But, as established by custom, the legislature may grant a divorce in a particular case unless prohibited by the constitution. *Maynard v. Hill*, 125 U. S. 190 (1888).

<sup>8</sup> *Appeal of Norwalk Street Railway*, 69 Conn. 576 (1897).

<sup>9</sup> *Western Union Telegraph Co. v. Myatt*, 98 Fed. 335 (1899).

<sup>10</sup> *Carter v. Commonwealth*, 96 Va. 791 (1899).

a number of express exceptions to it would have to be made. The general statement of the doctrine in the constitutions sometimes indicated a realization of the necessity for some modification of its strict application. Thus, the New Hampshire Constitution of 1784 provided that the three departments "ought to be kept as separate from and independent of each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."<sup>11</sup> Furthermore, a number of specific exceptions to the doctrine were embodied in the original constitutions and have continued with additions to the present day. Thus, the chief executive participates in legislation through his power of approving and vetoing bills. In granting pardons, he exercises a power which is judicial or quasi-judicial in its nature. On the other hand, in impeachment cases the legislature exercises a power of a similar nature. Finally, the power of the courts to set aside acts of the legislature as being in excess of its constitutional powers is substantially the exercise of a legislative power. These, and other exceptions which might be mentioned, are, in the aggregate, so important as to cut very deeply into the application of the doctrine.

The difficulty in applying the doctrine of separation of powers arises from certain fundamental misconceptions underlying it. Thus, it assumes that it is possible to make a clear-cut classification of governmental powers into legislative, executive, and judicial. In fact, there are certain powers which do not naturally fall into any of these classes, and their assignment to any one class is more or less arbitrary.<sup>12</sup> Thus, the courts in some states have held that the making of appointments is not a power primarily belonging to any one of the departments, and that, therefore, the vesting of such a power in the courts would not be a violation of the doctrine.<sup>13</sup> Those who hold to the strict application of the doctrine fall into the error of confusing powers or functions of government with sets of authorities

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<sup>11</sup> Thorpe, *op. cit.*, p. 2457.

<sup>12</sup> Baldwin, *American Judiciary*, Chap II.

<sup>13</sup> Fox v. McDonald, 101 Ala. 51 (1892), and cases cited therein.

established to exercise them. This error leads to the untenable assumption that the emergence of three more or less independent departments of government necessarily indicates the existence of the same number of fundamental and essentially distinct powers or functions of government. In reality, there are but two primary and fundamental powers or functions of government, *viz.*: the formulation and the execution of policies. There is no definite limit, however, to the number of more or less independent departments or sets of authorities that may exist in a given government. There can scarcely be, in the nature of things, any exclusive assignment of one of the two primary functions of government to a single department, but the work of each department involves the exercise of a combination of such functions. The executive department both influences the formulation of public policies and is intrusted with their execution, while the judicial department both legislates and administers. Usually, however, one of the two primary functions will be found predominant in the work of a given department. Thus, the work of the legislative department consists mainly in the formulation of public policies, while that of the executive department usually consists mainly in the execution of such policies.

Again, the proponents of the doctrine sometimes fail fully to appreciate the necessity for the interdependence of the departments of government. Just as, in the various forms of organic life, the process of differentiation of structure and function is accompanied by the development of correlative means of integration, so, in the field of political life, the division of the powers of government among more or less separate departments is accompanied by the creation of certain ligaments or connective tissue binding them more or less closely together. Without such means of integration, the government would consist of a series of disjointed departments and authorities, among which harmonious action would frequently be impossible. This necessary integration of the departments of government is secured to some extent through the common control exercised by the sovereign power in the state over the organization of the various departments, but more especially through the creation

of avenues of control exercised by one department or authority over another. Where the legal sovereign is quiescent, or the organization of the government such as to render the control of the political sovereign ineffective, dependence for the necessary means of integration must, in the first instance, be had upon the reciprocal control of the various sets of authorities over each other. In case, however, the laws regulating the organization and relations of the different departments do not sufficiently provide for such avenues of control, the necessary control may grow up in an extra-legal fashion outside the governmental system. Thus, in the United States, the political party has, as one of its most important functions, the at least partial integration of the more or less separate departments and officers of government.<sup>14</sup> In addition to the extra-legal control of the political party, avenues of interdepartmental control are also provided.

The authors of the *Federalist* realized that a mere paper demarcation of the proper spheres of the several departments of government by constitutional provision would not necessarily keep them from exceeding these limitations. They held that there was a need for some practical security against encroachment by one department upon the sphere of another. They deemed that it was not practicable constantly to recur to the people to correct such breaches of the constitution. Although they probably did not visualize the extent to which the courts would come to exercise the power of declaring legislative acts unconstitutional, they presented a very cogent argument in favor of the need for the exercise of this power in a limited government.<sup>15</sup> This power, although assumed by the courts in many instances without express grant, is now virtually recognized in a number of states by constitutional provision.<sup>16</sup>

### Constitutional Conventions

As the fundamental law of the state, a constitution is properly enacted by the people of the state. The whole people, as the

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<sup>14</sup> Cf. Ford, *Rise and Growth of American Politics*, p. 215.

<sup>15</sup> The *Federalist*, No. 78.

<sup>16</sup> E.g., Constitution of Illinois, Art. VI, Sect. 11.



constitution-making power, are too numerous to meet together in primary constituent assembly, and resort must therefore be had to elected agents or representatives. Such representatives might be those elected to the regular legislative body, and, as has been indicated above, this was the plan followed in the case of the adoption of some of the Revolutionary state constitutions. This is also the method still followed in Rhode Island, where a constitutional convention cannot be called. But as the distinction between constitutional law and ordinary statutory law became more widely understood and appreciated, the opinion came to be generally held that there should also be a distinction in the method of enacting these respective grades of law. This distinction was brought about principally in two ways: first, by electing special conventions to draw up proposed new constitutions and, secondly, by requiring their submission to the people for ratification.

In all the states, except Rhode Island, a convention is now the regularly accepted method of drawing up a new constitution or making a general revision of the old one. It is true that some of the early constitutions made no provision for alteration or amendment and some of the existing constitutions make no provision for holding a convention. Lack of any provision for change was due in part to the idea that such a provision was unnecessary, since the people have an inherent right to change the fundamental law, and also in part perhaps to the idea, derived from French Revolutionary theory, that it was possible to draw up a constitution so nearly perfect that it would never need alteration. The latter theory, of course, ignored the rule of progress and the need for modifying the fundamental law so as to make it fit changing conditions.

A convention for revising the constitution may, as a rule, be called only in accordance with the provisions of the existing constitution. In some states where no such provisions exist, the courts have through various decisions developed the rules of procedure to be followed in calling the convention. The regular legislative body usually participates in the process of calling a convention, and, in most states, that body may in its

discretion submit to the voters the question as to whether a convention shall be held.<sup>17</sup> As a rule, the convention cannot be held unless the question has been submitted to popular vote, and answered affirmatively. In some states, the constitutions require that this question shall be submitted to the voters at regular intervals, varying from ten to twenty years, except in New Hampshire, where the interval is seven years. But, in that state, the convention is the only method of amending the constitution.

The constitutions do not usually provide adequately for the election of delegates to the convention, and such provisions as they may contain must be supplemented by legislative acts. Exceptions to this, however, are found in New York, Michigan, and Missouri, where the periodical assembling of conventions is provided for independently of further legislative action. In the other states, the legislature passes the "convention act" containing necessary provisions supplementing those in the constitution relating to the election of delegates and the assembling of the convention. The delegates are usually elected from the same districts and in the same manner that the members of

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<sup>17</sup> In Illinois, in order to pass a resolution in the legislature, either to call a convention for revising the constitution or to propose a separate amendment to the people, a two-thirds vote of the members of each house is required, so that one-third of the membership of the legislature can always prevent any constitutional change, even when desired by considerably more than a bare majority of the legislature and of the people. If the difficulty of securing a two-thirds vote in the general assembly for calling a convention has been overcome, it is still necessary for the movement for a new constitution to jump two hurdles in the form of popular elections. The first election is the "next general election" after the resolution has passed the legislature, at which the question of calling a convention is submitted to the people; the second election is that held after the adjournment of the convention for the purpose of ratifying its work. In both elections, the constitutional proposition, in order to carry, must receive a majority of all votes cast, not on the proposition but at the election. In the case of the first election, such a majority would be more difficult to secure than in the case of the second election, because, in the former, other matters would be presented to the voters for their decision which might distract their attention from the constitutional proposition, while, in the latter, the proposition would be submitted at a special election so that a majority of those voting on the proposition would be equivalent to a majority of those voting at the election.

one or the other branch of the legislature are elected, although occasionally there are some additional delegates elected from the state at large. The delegates have occasionally been nominated by petition only and elected on a nonpartisan ticket on the theory that a convention, assembled to frame a fundamental law for the state, should be above partisan considerations. This was the plan followed in the case of the Ohio convention of 1912, although the existing constitution of that state provided that delegates to a convention should be chosen in the same manner as members of the house of representatives, who were elected on partisan ballots.

The constitutional convention consists universally of one body and thus avoids the cumbrous organization found in the bicameral legislature. This feature, in itself, enables the convention to work under somewhat better conditions than the legislature does, and it is usually possible to secure a somewhat abler body of members in a convention than in the legislature, since the results of a convention's work are likely to be more important and to have a greater effect upon the development of the state. The convention organizes itself by choosing its own presiding officer, who usually appoints the various committees to whom are assigned for consideration and report the various proposals for constitutional change. In some conventions, considerable use has also been made of the committee of the whole. In order that the convention may have adequate information at its disposal and in order to facilitate its work, provision should be made for collecting such data and for investigating matters which may come before the convention before that body meets. This has been done in the case of some recent conventions, including those of New York, Massachusetts, and Illinois.

Although the legislature, in passing the "convention act," may attempt to limit the powers of the convention, it is generally held that its powers are unlimited except that it must act in accordance with the provisions of the existing constitution, which is still the fundamental law until displaced by the new constitution. The convention is also subject to the restrictions of the Federal Constitution and, in the absence of express re-

strictions in either state or Federal Constitutions, it is subject to those implied in the limited nature of its functions.<sup>18</sup> It cannot usurp the functions of the regular departments of the state government, although, in inserting statutory matter in proposed constitutions, it virtually participates in the process of ordinary legislation. The convention is virtually an advisory body, created for the purpose of suggesting to the people for their adoption or rejection certain changes in the fundamental law. Before these proposed changes can go into effect, they are required, as a rule, to be approved by a majority of the voters at a special election held to determine the question. Submission of proposed constitutional changes to popular vote was introduced in most of the early states during the first quarter of the nineteenth century, and has been the almost invariable practice during the last half century, the exceptions being nearly all found in certain Southern states where the large negro population made the conditions so peculiar that the conventions did not deem it feasible to submit the new instruments to popular vote.

Three methods of submitting to the people a proposed general revision of the constitution are found. In the first place, a considerable group of proposed amendments may be submitted as separate propositions. Thus, in Ohio in 1912 forty-two separate proposed amendments were submitted to the voters, who adopted thirty-four and rejected eight. This method gives the people a larger measure of discretion in discriminating between the different parts of the proposed general revision, but it places upon them a larger task of selection than they are generally able to perform intelligently, and, unless there is a very extensive campaign of popular education upon the issues, there is likely to be a considerable amount of blind voting. In the second place, the convention may submit the bulk of the proposed constitution as a single proposition, accompanied by a few proposed amendments submitted separately. This method was followed in New York in 1915, and, although it was not successful in that case, it has the advantage

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<sup>18</sup> Dodd, *Amendment and Revision of State Constitutions*, p. 92.

of enabling the convention to submit as separate propositions those matters which may arouse special controversy. In the third place, the convention may submit the entire proposed new constitution as a single proposition, so that the people have no choice except to adopt or reject the entire instrument. This was the method followed in Illinois in 1922, which resulted in the defeat of the entire proposed constitution by a large vote. This constitution contained some excellent provisions, and was on the whole perhaps an improvement over the existing constitution, but all groups of voters who were opposed to any of its provisions were compelled to vote against the entire document in order to defeat those provisions which they deemed to be obnoxious. Judging from experience, it seems clear that, in submitting to popular vote the work of a convention, the risk of carrying the whole instrument down to defeat should be as far as possible avoided by submitting some provisions, especially those of a controversial character, as separate propositions.

### **Legislative Proposal of Amendments**

When a general revision of the constitution is not intended, but it is desired to adopt merely one or a few specific amendments, a convention is not necessary, except in New Hampshire, and the method generally followed is that of legislative proposal and popular ratification, this plan having been first introduced during the first quarter of the nineteenth century. In Delaware, however, an amendment is adopted by two successive legislative sessions without submission to popular vote. In some other states action by two successive legislative sessions is necessary before submission to popular vote. In the early history of the states, this device was more prevalent, the second legislative action being required as a means whereby the people might indirectly pass on the proposal. This requirement serves also to indicate the importance of the action of the legislature in such cases. In the majority of states, however, action at one legislative session is sufficient, but the importance of such action is emphasized by the requirement of an extraordinary majority, usually either two-thirds or three-fifths, in each house,

although in a few states, only a bare majority of the members is required.

In order to prevent amendments from being adopted hastily or without adequate consideration, many restrictions exist in various states upon the process of adoption. These restrictions limit the number and frequency of amendments, and make special requirements regarding the size of the popular vote necessary for ratification. Illinois may be taken as typical of the states in which the process of adopting amendments has been hedged about with extreme difficulties. In that state, no less than three different obstacles are placed in the way of constitutional change by legislative proposal, any one of which would ordinarily be sufficient to block any easy or radical revision. The first obstacle is that the amendment cannot be proposed or submitted to popular vote unless it has first received the favorable vote of two-thirds of all members elected to each of the two houses. The second obstacle is that the proposed amendment must be submitted to popular vote at the next election of members of the general assembly, and must be ratified by a majority of the electors voting, not on the proposition, but at the election. The third obstacle is that "the general assembly shall have no power to propose amendments to more than one article of this constitution at the same session, nor to the same article oftener than once in four years."

The constitutional requirement of a majority of all votes cast at the election is a very considerable obstacle to the adoption of any amendment. Thus the proposed amendment of 1916, designed to enlarge the powers of the general assembly over the subject matter of the taxation of personal property, received a majority of the votes cast at the election for the legislative candidates, but failed by about 15,000 of receiving the necessary majority of the total vote of 1,343,000 cast at the election.

During the decade since the adoption of the canal bond issue amendment of 1908, however, the principal difficulty in the way of amending the constitution has been the restriction that the general assembly cannot propose amendments to more than one article of the constitution at the same session. The growing need for constitutional change led to the initiation of numer-

ous movements by voluntary organizations, such as the Citizens' Association of Chicago and the Initiative and Referendum League, looking to the amendment of the constitution in various respects. Each of the leading political parties of the state also committed itself in its state platforms to one or more of these proposed amendments.

The more numerous the various proposals for constitutional amendment, and the more insistent the various organizations became in urging the submission by the general assembly of the particular amendments in which they were interested, the more difficult it became to secure action by that body. Since amendments could be proposed to only one article of the constitution at the same session, it resulted that, at each session, the conflict between the advocates of amendments to different articles of the constitution over the question of the priority of submission resulted invariably in the failure to submit any amendment until the adoption in 1915 of a joint resolution providing for the submission of the proposed amendment granting enlarged power to the general assembly over the subject matter of the taxation of personal property.

It was true that, in the case of some of these amendments, two or more of them might have been submitted by the legislature at the same time. Thus, the proposed amendment for the initiative and referendum on ordinary legislation and the proposition to abolish minority representation might have been submitted simultaneously as both would amend the same article of the constitution. It has also been held that the constitutional restriction does not prevent implied amendments or changes necessarily worked in other articles of the constitution by the express amendment of a particular article of the constitution. Nevertheless, two of the most prominent proposed amendments, the initiative and referendum proposition and the proposition to amend the amending clause, could not be submitted at the same session and consequently were, in effect, mutually antagonistic. Moreover, the adoption of any thoroughgoing short ballot plan at one time by the method of constitutional amendment was impossible even in the absence of any competing amendment, since such a plan would necessarily operate to

amend more than one article of the constitution. These difficulties in the way of constitutional change through the separate amendment method seemed to indicate that a constitutional convention was inevitable and indispensable if constitutional revision adequate to the needs of the state were to be made.

The obstacles to amendment in the constitutions of such states as Illinois and Indiana have operated at one time or another to prevent the adoption of constitutional amendments the need for which was very widely felt and keenly realized. It may be questioned, therefore, whether such constitutions are not unduly restrictive of amendment, so as to prevent greatly needed changes until the demand for them has become almost universal. The framers of these constitutions were so well satisfied with their handiwork that they apparently anticipated little need for change; and they seem also to have felt on general principles that a constitution should be capable of amendment only with extreme difficulty. This view has also been held by many persons since that time, especially by members of the legal profession. They have pointed out that constitutional changes involve the unsettling of judicial interpretation of the previous constitutional provisions, that nearly every change in the basic law requires the courts to go through a long period of judicial construction, and that meanwhile it is better that the constitution be somewhat ill adapted to the needs of the day than that the meaning of its provisions be uncertain. Comparison has also been made with the Federal Constitution, and it has been argued that since the latter has been but infrequently amended, therefore the state constitution should also be rarely amended, and the extreme restrictions contained in that instrument against amendment are valuable aids in preventing hasty and ill-considered change. It is of course true that the state constitution should not be lightly and needlessly tinkered with, but the argument by analogy from the Federal Constitution appears to be unsound for two reasons. In the first place the Federal Constitution is the supreme law of the land, while that of the state is not the fundamental law of a sovereign government but merely of a component government, subordinate to the whole. In the second place the Federal Constitution consists principally of broad



general principles and the main outlines of a framework of government, leaving the details to be filled in largely by legislation, while, on the other hand, the state constitution is a comparatively lengthy document, containing much matter of a statutory character. The more detailed a constitution, the more likelihood will there be of the need for change and the more frequently will the need for change arise, and therefore the method of amendment should be made easy of operation. Impediments of the character described above, which render the constitutions virtually unamendable, exist in about a dozen states. In the others, however, the constitutions are more easily amendable.

### **Amendment by Popular Initiative**

In order to increase the control of the voters over the process of constitutional amendment, the method of amendment through the popular initiative and referendum has now been adopted in about one-third of the states. This plan was first introduced in Oregon in 1902. It provides that eight per cent of the voters, as determined by the size of the vote cast at the last preceding regular election, may sign a petition containing the text of the proposed amendment and file it with the secretary of state, whose duty it then becomes to submit it to the voters at the next election for their approval or rejection. The proposed amendment is adopted if it receives an affirmative majority of the votes cast on the measure.

In the other states in which this plan has been adopted, there are many variations in details, such as, for example, the percentage of signatures required on the petition, but, in most of these states, the general features of the plan are similar. In a few states, however, rather striking differences are found. Thus, occasionally a definite number of signatures is required instead of a percentage of the voters, reaching as high as 25,000 in Massachusetts. Moreover, in that state as well as in Michigan, a proposed amendment goes first to the legislature, whose approval is necessary before the measure is submitted to the people. In these two states, at the time of submission to popular vote, an alternative proposal may also be submitted by the

legislature. In order to adopt the measure in these two states, as well as in Nebraska, it must receive at the polls not only a majority of the votes cast on the proposition but also a certain percentage, varying from thirty to thirty-five, of the total votes cast at the election.

The few states which require legislative approval of initiative measures thereby probably preclude the possibility of adopting certain constitutional amendments which might be adopted in the other states not having this requirement. Thus, in Oregon a few years ago a proposed amendment was submitted through initiative petition providing for the abolition of the state senate. The proposal was not adopted, but it is probably safe to say that such a measure could not even have been submitted in states requiring legislative consent as a prerequisite to such submission. In Oregon, California and some other states, the arguments for and against proposed amendments are published in a pamphlet and distributed to the voters at public expense. This probably tends to promote publicity, and to some extent to educate the electorate on the issues involved. The method of amendment by popular initiative is usually more expeditious than that by legislative proposal. The movement for constitutional amendment by popular initiative has been strongest in the states where the people have been most alive to the lack of responsiveness to popular wishes on the part of the legislature.

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## CHAPTER III

### STATE POWERS AND LIMITATIONS

SINCE the states existed prior to the adoption of the Constitution of the United States, that instrument does not undertake to specify in detail what the powers of the states are, but lays down the general principle in the Tenth Amendment that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." The Constitution of the United States is also a constitution for the states in so far as it applies to them. It recognizes the existence of the states as governments operating concurrently over the same territory, but does not undertake to provide for the organization of government within the states. The powers of the states are usually spoken of as inherent, original, or reserved, as contrasted with the powers of the national government, which are delegated or conferred by the constitution, either expressly or impliedly. This is true in the main, but by way of exception to this general principle, it should be noted that some of the powers of the states are expressly delegated to them by the Constitution of the United States. Thus, upon the state legislatures is conferred the power of prescribing the manner of choosing presidential electors and the times, places and manner of holding elections for senators and representatives in Congress. Again, the states in form are given concurrent power to enforce the Eighteenth Amendment by appropriate legislation.

#### Constitution-Making Power

It would be tedious as well as unnecessary to attempt to make an exhaustive enumeration of the powers of the states. Certain general classes of state powers may be mentioned, however, noting at the same time the limitations in the Constitution of the United States resting upon the exercise of such powers. Thus, in framing its constitution, a state has a wide range of

discretion without running counter to the limitations of the Constitution of the United States. Its reserved powers are quite extensive and include such matters as the establishment of organs of representative government, legislative, executive, and judicial, and a system of local governmental areas and subdivisions. It provides for the fundamental guarantees of civil and political liberty. Partly by the constitution and partly by legislative action it adopts a system of civil and criminal law and procedure, and provides for the regulation of taxation, corporations, education, charities and correction, conditions of labor, elections, public health, and other administrative matters. In respect to these topics, however, the state acts are subject to certain limitations in the Constitution of the United States.

### Financial Powers

The grant to the National Government of the powers of taxation not being exclusive, the states may still exercise a concurrent power of levying taxes. State and Federal taxes may legally be levied on the same objects, but an effort has generally been made as far as practicable to avoid such double taxation, the National Government depending for the most part upon indirect taxes, while the taxes of the states are, in the main, direct.<sup>1</sup> Certain express limitations are laid down in the Constitution of the United States upon the taxing power of the states. Thus, the states are prohibited, without the consent of Congress, from levying tonnage duties, that is, taxes based on the cubic capacity of the vessel. This was doubtless intended to prevent the states from interfering, under the guise of their taxing powers, with the means used for carrying on foreign commerce. For the purpose of preventing them from interfering in the same way with foreign commerce itself, they are further prohibited, without the consent of Congress, from taxing imports or exports, except to such extent as may be absolutely necessary for executing their inspection laws. No revenue can be derived by the states from the operation of this exception, since any surplus derived therefrom must be paid into

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<sup>1</sup> Through its income tax, however, the National Government has now encroached very considerably upon the field of direct taxation.

the treasury of the United States. Although goods in transit from one state to another are not imports or exports in the sense in which those words are used in the Constitution, nevertheless, the states cannot tax them since this would be an unconstitutional interference with interstate commerce.

The powers delegated to the National Government by the Constitution are not only those expressly granted by that instrument, but also those implied in the express grant or which may be necessary and proper for carrying the express powers into execution. In the exercise of its implied powers, Congress authorized the incorporation of a bank of the United States, and a branch of the bank was established at Baltimore. The state of Maryland undertook to levy a tax upon the note issues of this branch bank, but, in the Supreme Court of the United States, it was held in 1819 that such a tax is unconstitutional.<sup>2</sup> That tribunal laid down the doctrine that the power to tax involves the power to destroy and that the states could therefore not be allowed to tax the instrumentalities established by the National Government without seriously interfering with the performance of its constitutional functions. This limitation on the power of the state, however, the court pointed out, would not prevent the state from taxing the real property of the bank in common with the other real property within the state. This limitation upon the powers of the states prevents them from taxing the property of the United States without its consent.<sup>3</sup> It also prevents them from taxing the lawful agencies and instrumentalities of the United States, such as the salaries of Federal officers, since this might interfere with the performance of their duties, nor can the states tax the bonds issued by the National Government, since this might interfere with its borrowing power.<sup>4</sup> Similarly, the states are not allowed to levy a license tax on the drivers of United States mail trucks.

Other limitations upon the financial powers of the states are that they cannot coin money or emit bills of credit or make anything but gold and silver coin issued by the National Gov-

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<sup>2</sup> *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

<sup>3</sup> *Van Brocklin v. Tennessee*, 117 U. S. 151 (1886).

<sup>4</sup> *Weston v. City Council of Charleston*, 2 Pet. 449 (1829).

ernment a legal tender in payment of debts. They may, however, borrow money through the issuance of bonds and may charter state banks and authorize them to issue notes for circulation. In 1866, however, Congress levied a ten per cent tax on the note issues of state banks, which was intended to, and had the effect of, taxing such notes out of existence.<sup>5</sup>

### Regulation of Commerce

As a general rule, the states have full control over the regulation of intrastate commerce, through their police powers or the power of taxation. As pointed out above, the states cannot tax interstate commerce or imports or exports, but when goods which have been transported through the channels of foreign or interstate commerce have reached their destination and have become merged in with the general mass of property within a state, they may be subject to taxation by the state in common with other property in the state without discrimination on account of their foreign or extrastate origin. There are some exceptions to the general rule that the states have complete control over intrastate commerce. Thus, it has been held that Congress may require safety appliances on all the cars of a train on an interstate railroad, even though some of the cars are traveling between points entirely within the state.<sup>6</sup> This case is an illustration of the fact that interstate and intrastate commerce are often so closely intertwined that it is hardly feasible for Congress to exercise its full power of regulating interstate commerce without also incidentally regulating intrastate commerce to some extent. A more important limitation was placed on the powers of the states over intrastate commerce when, in 1922, the Supreme Court of the United States enjoined the railroad commission of Wisconsin from interfering with the maintenance of intrastate rates as fixed by the Interstate Commerce Commission.<sup>7</sup> On the other hand, the states may still

<sup>5</sup> The act of Congress was upheld by the Supreme Court in *Veazie Bank v. Fenno*, 8 Wall. 533 (1869).

<sup>6</sup> *Southern Ry. Co. v. United States*, 222 U. S. 20 (1911).

<sup>7</sup> *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R.*, 257 U. S. 563 (1922). For further discussion of this case, see below Chap. XII.

make regulations which incidentally affect interstate commerce where the regulations relate to local matters which have not been covered by laws of Congress. Thus, in the exercise of their police powers, the states may regulate the speed of interstate trains at highway crossings and within city limits, and the sanitation and heating of passenger cars on such trains in the interests of the health and safety of the passengers.

### Regulation of Personal and Property Rights

Under their general reserved powers, the states enact laws regulating the relations of citizens with each other and towards the state. They pass laws for the punishment of crimes against the state. No one can be punished for a crime, however, without his "day in court." This results from the prohibition resting on the states against depriving any person of life or liberty without due process of law, and from the prohibition against the passage by the states of a bill of attainder, which has been defined as a "legislative act which inflicts punishment without a judicial trial."<sup>8</sup> The states are also prohibited from passing *ex post facto* laws, that is, criminal laws which are retroactive in their operation.

In exercising the broad power of regulating the civil rights of individuals, the states also rest under certain fundamental constitutional limitations. Thus, they are prohibited from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. It has been held by the Supreme Court, however, that such privileges or immunities do not embrace all the ordinary civil rights, but only those which a person has by virtue of his Federal citizenship as contradistinguished from those which he enjoys by virtue of his state citizenship.<sup>9</sup> This decision by a divided court is of great importance since an opposite decision would have gone far towards destroying the dual character of our government.

More important limitations on the power of the states to regulate personal and property rights are those found in the

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<sup>8</sup> *Cummings v. Missouri*, 4 Wall. 277 (1867).

<sup>9</sup> *Slaughter House Cases*, 16 Wall. 36 (1872).



provisions of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. These provisions extend protection against hostile state action to "persons," which is a broader term than "citizens," and includes not only individual citizens but also aliens, whether capable of becoming citizens by naturalization or not, and corporations, which are not citizens within the meaning of that word as used in any provision of the Constitution of the United States except that giving the Federal courts jurisdiction in cases of diverse citizenship. The term "due process of law" has not been fully defined by the courts, but in a vague way it has been spoken of as requiring "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."<sup>10</sup> Whether a given state law or administrative proceeding complies with this requirement or not depends, in reality, very largely upon the opinion of the court as to its reasonableness. This gives to the Supreme Court of the United States a very large degree of control and censorship over state action. The same observation is also true as to the application of the requirement regarding the equal protection of the laws. This provision is designed to prevent undue discrimination by a state between individuals or corporations in substantially similar circumstances. It does not prevent the states from classifying persons and corporations and subjecting different classes to different regulations, provided the classification is based on a reasonable distinction, but the Supreme Court of the United States is the final judge as to the reasonableness of the classification.

Under its power of eminent domain, a state may take, or authorize the taking, of private property for public use, provided just compensation be given. This condition is generally laid down in the bills of rights of state constitutions. The Constitution of the United States does not specifically require

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<sup>10</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877).

that compensation be given in such circumstances, but it has been held that the due-process-of-law clause of the Fourteenth Amendment virtually requires this.<sup>11</sup> Presumably, private property cannot be taken for private use, even with compensation, but what is a public use is very largely a matter of judicial opinion. Property may also be taken by taxation, and, to some extent, under the police power, and although no specific compensation is required in these cases, the taking may not be arbitrary, but only in accordance with legal forms and reasonable requirements.

Another important protection of property rights against encroachment by the state is found in that provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. This clause was probably intended by the framers of that instrument to apply only to contracts between individuals, but in the Dartmouth College case, Chief Justice Marshall enlarged its meaning so as to make it apply to contracts to which a state is a party.<sup>12</sup> It results from this doctrine that if a state grants a charter to a private corporation containing a clause providing for exemption of its property from taxation, such exemption cannot be subsequently withdrawn at the option of the state in contravention of the terms of the charter. In order to guard against this result, it is now frequently provided in state constitutions and general laws that legislative grants to private corporations shall be subject to alteration or repeal. Even without such stipulation, the state may at any time alter or repeal the charters of public or municipal corporations, since such charters are not contracts within the meaning of the constitutional prohibition against the impairment of the obligation of contracts.<sup>13</sup> Moreover, a public office does not rest on contract, so that the state may abolish the office or change the compensation without running counter to the constitutional prohibition under consideration. Finally, it should be pointed out that a state cannot, by contract, divest itself of its police power,

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<sup>11</sup> Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226 (1897).

<sup>12</sup> 4 Wheat. 518 (1819).

<sup>13</sup> Laramie Co. v. Albany Co., 92 U. S. 307 (1875).

nor do existing contracts limit the state in the exercise of that power.

### The Police Power

The police power of the states has been well described as "perhaps the most important, and certainly the most comprehensive, of those which are reserved to the states by the Tenth Amendment."<sup>14</sup> The conflict between state power and individual rights has frequently arisen in connection with the operation of the police power. This power is therefore worthy of somewhat extended consideration.<sup>15</sup> The term "police power" seems to have been used for the first time by Chief Justice Marshall in the well-known case of *Brown v. Maryland*,<sup>16</sup> decided in 1827. He held that, in spite of the power of Congress to levy import duties, the power to direct the removal of dangerous explosives, such as gunpowder, "unquestionably remains, and ought to remain, with the state," as a branch of the police power.

### The Nature of the Police Power

Although this was the first use of the term, the idea involved was much older. In the constitutional convention of 1787, this power was called that of "internal police," and seems to have been used as practically equivalent to the "residuary sovereignty" of the states. This broad meaning has also sometimes been attached to the term by the courts. Thus, in the License cases,<sup>17</sup> Chief Justice Taney refers to it as the "power of government inherent in every sovereignty . . . to govern men and things within the limits of its dominion." Another broad definition of this power was given by Justice Field, who described it as the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the

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<sup>14</sup> C. K. Burdick, *The Law of the American Constitution*, p. 225.

<sup>15</sup> The section on the Police Power is reprinted from the author's article on "State Power and Individual Rights," in the *Illinois Law Quarterly* for June, 1922, pp. 253-262.

<sup>16</sup> 12 Wheat. 419 (1827).

<sup>17</sup> 5 How. 504 (1847).

state, develop its resources, and add to its wealth and prosperity."<sup>18</sup> These broad definitions or descriptions of the police power are not usually necessary to the decision of the cases before the courts, and, in actual application to concrete questions brought before them, the scope of the police power is usually narrower than these definitions would imply. It is not a transcendent nor all-inclusive power, but, although vague in extent, is subject to constitutional limitations. It is also to be distinguished from other powers of government, such as those of taxation<sup>19</sup> and of eminent domain. By the latter power, private property may be taken for public use, provided just compensation be given. Property may also be taken under the police power, but only when the use of such property is detrimental to the public interests, and, in this case, no compensation need be given. Ordinarily, however, property is merely regulated by the police power and not actually taken.

There is a national police power as well as that of the states. There is no express grant of this power to the National Government in the Constitution of the United States, but incidentally to the exercise of powers expressly granted to that Government, a national police power may be exercised. Thus, Congress has excluded lottery matter and obscene literature from the mails, and has enacted antitrust statutes and meat inspection laws, as incidental to the exercise of its postal and commerce powers. The states, however, are able to exercise a broader and more general police power than that of the National Government. They may exercise it directly through their own departments of government, or they may delegate it to the municipalities within their borders. Although municipalities can exercise no powers except those granted to them by the state, either expressly or by implication, in practice the scope of the police power of municipalities is usually quite broad.

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<sup>18</sup> *Barbier v. Connolly*, 113 U. S. 27 (1885).

<sup>19</sup> The police power is sometimes exerted in the guise of a tax law. Thus a provision for a dog tax may be designed primarily to promote public safety rather than to produce revenue. Requirements of the payment of license taxes before engaging in certain occupations, deemed to be dangerous to health or morals, may be in reality police regulations.

The principle on which the exercise of the police power is based is that all individual rights of liberty and property are held subject to such reasonable limitations and regulations as may be necessary or expedient for the protection of the common good and the general welfare.<sup>20</sup> This principle is succinctly expressed in the maxim, "so use your own property as not to injure that of others." With this maxim is also sometimes associated that which declares that "the safety of the people is the highest law." This principle, of course, represents a departure from the individualistic philosophy of *laissez faire*, which was formerly widely prevalent. This departure, however, has been rendered practically necessary on account of the increasing complexity of the social, economic, and industrial conditions of the present day. In dealing with these complexities, the states, under the guise of the police power, are interfering with the exercise of individual rights to an extent never dreamed of by our forefathers.

### The Scope of the Police Power: The Fundamental Objects

The scope of the police power as exercised by the states and municipalities includes two main divisions: (1) that relating to fundamental objects of social welfare, and (2) that relating primarily to mere economic matters. The first class deals primarily with persons, and the second with property; although, in many instances, both of these phases of the subject are involved. Under the first main head, the usual objects of the police power are the promotion of the public peace or order, the public safety, the public health, and the public morals. It is impossible to enumerate all the concrete examples of the exercise of the police power, because they are practically infinite in variety and extent. But a few examples will indicate the general characteristics of each group. Thus, in order to promote the public peace or order, provision may be made prohibiting the carrying of concealed weapons without a license, prohibiting the holding of meetings in the streets and parks without a license, and imposing on municipalities liability for

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<sup>20</sup> *Commonwealth v. Alger*, 7 Cush. 53 (1851).

damages from mobs and riots.<sup>21</sup> These measures might also be considered as promotive of the public safety. Other examples of safety measures are those requiring vehicles to turn to the right, regulating the speed of travel on roads, requiring that electric wires shall be placed under the surface, that dogs shall be muzzled, that street cars shall be equipped with fenders, that theaters shall be equipped with asbestos curtains and doors opening outward, that buildings of more than a certain height shall be equipped with fire escapes, and that gunpowder shall not be stored in populous areas. Under the head of measures designed to protect the public health may be mentioned those providing for the establishment of quarantines and the abatement of nuisances, requiring the vaccination of school children, requiring light and ventilation in workshops, prohibiting livery stables in certain sections without the consent of a majority of the adjacent property owners,<sup>22</sup> and many pure food and drugs acts prohibiting the selling or keeping for sale of unwholesome or adulterated foods, requiring the inspection of milk, meat and other provisions, and prohibiting the selling of poisonous drugs, unless properly labeled. Laws prohibiting the sale of cigarettes and of intoxicating liquor may be regarded as designed to protect either the public health or the public morals, or both. Other examples of measures intended to protect public morals are antigambling and antilottery laws and laws prohibiting indecent or obscene publications and exhibitions.

The above are the ordinary and usual objects of the police power, considered from the fundamental social point of view. Some police laws may be justified even though they relate only remotely to any of the usual objects of the police power. Thus, compulsory attendance laws may be upheld, perhaps, as protecting the morals of school children, although they are mainly designed to promote the general welfare of society. Sometimes, the courts have frankly held that the police power may be exercised to promote objects other than those primary objects

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<sup>21</sup> *Chicago v. Sturgis*, 222 U. S. 313 (1911).

<sup>22</sup> *City of Chicago v. Stratton*, 162 Ill. 494 (1896); *City of Spokane v. Camp*, 97 Pac. 770 (1908).

enumerated above. Thus, the Supreme Court of the United States, speaking by Justice Harlan, has declared:

We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals, or the public safety. . . . And the validity of a police regulation . . . must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.<sup>23</sup>

In 1899, the same court, speaking by the same justice, upheld the constitutionality of a state statute requiring railroads to stop certain trains at towns having a population of three thousand, although there was no question of health, morals, or safety involved, but simply a matter of public convenience.<sup>24</sup> It is true, of course, that the promotion of the public comfort or convenience is not so urgent a matter as the promotion of the primary and more fundamental objects of the police power, such as health, safety, and morals. For this reason the exercise of the police power for the former purpose is restricted within narrower limits and is usually, though not invariably, upheld only when applied to restrain the antisocial activities of public service corporations or businesses affected with a public interest.

The courts have not heretofore been inclined to uphold attempted exercises of the police power for merely æsthetic purposes. "Æsthetic considerations," it has been declared, "are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."<sup>25</sup> This question has arisen frequently in connection with the attempts of cities to regulate billboards and to require the establishment of building lines. Such regulations have usually been held invalid if capable of being supported on no other than æsthetic

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<sup>23</sup> Chicago, B. & Q. Ry. Co. v. Illinois, 200 U. S. 561, at p. 502 (1906). The same position was taken in Chicago & Alton R. R. Co. v. Transbarger, 238 U. S. 76 (1915).

<sup>24</sup> Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285 (1899).

<sup>25</sup> City of Passaic v. Paterson Bill Posting Co., 72 N. J. L. 285 (1915).

grounds.<sup>26</sup> But they will be sustained if capable of being supported on the ground of safety or morals.<sup>27</sup> Thus, it would of course be valid to prohibit the exhibition of indecent posters on billboards, in the interest of morals; and, in the interest of safety, their location and strength of construction might be regulated.

### The Economic or Newer Phase

As indicated above, the second main phase of the police power is that which deals primarily with mere economic matters. It undertakes to promote the general welfare by restricting those economic activities of individuals and corporations which may endanger it. This phase of the police power is by no means so well defined as the first phase. Some examples, however, will indicate in a general way the scope of this branch of the subject. Thus, various states have undertaken to prevent fraudulent or dishonest transactions through the passage of such laws as those establishing standard weights and measures, forbidding the giving of trading stamps, and forbidding the sale of merchandise in bulk without notice to creditors. In order to prevent the economic oppression of certain classes of persons, such as debtors and consumers, laws have been passed prohibiting the charging of usurious rates of interest, and prohibiting combinations in restraint of trade. State antitrust laws have usually been upheld, but that of Illinois was declared unconstitutional in 1902 as violating the equal-protection-of-the-laws provision of the Fourteenth Amendment in that it expressly exempted farmers and livestock raisers from its operation.<sup>28</sup>

Other examples of the economic or newer phase of the police power are found in those laws passed for the conservation of natural resources. Thus, laws establishing closed seasons for fish and game and forbidding the pumping out of natural mineral springs have been upheld as valid exercise of the police

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<sup>26</sup> *Eubank v. Richmond*, 226 U. S. 137 (1912). But *cf.* *St. Louis Advertising Co. v. City of St. Louis*, 249 U. S. 269 (1918).

<sup>27</sup> *Cusack v. Chicago*, 242 U. S. 526 (1917).

<sup>28</sup> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902).



power.<sup>28a</sup> Another important aspect of this branch of the subject relates to the regulation of public service companies and other businesses affected with a public interest. This subject, however, is so large as to require separate treatment. Such treatment must also be accorded to the important subject of labor legislation, which partakes of both the social and the economic phases of the police power.<sup>28b</sup> On account of the ever-changing conception of public welfare, new subjects are continually coming within the scope of the police power.

### The Regulation of Occupations

As illustrating somewhat further the scope and operation of the police power, mention may be made of certain ways in which the state attempts to limit individual rights, as by the regulation of occupations, through race legislation and through liquor legislation. These matters also partake of both phases of the police power. Among the recognized rights of the individual is that of freely entering into lawful callings and occupations for the purpose of earning a livelihood. Most occupations, however, affect not only the individuals who choose them but affect also the public generally who may avail themselves of the services of those engaged in the various occupations and professions. On this account, the police power may be exerted for the purpose of limiting the privilege of engaging in certain occupations to those having the requisite qualifications. Such occupations are those in which certain degrees of professional skill and probity are necessary in order to protect the health, safety, or morals of the public, or to prevent fraud and deception. No one has a right to practice these professions unless licensed by proper authority. The most usual professions subject to such regulation are those of physician, lawyer, banker, druggist, dentist.<sup>29</sup> Others sometimes regulated in this manner are those of barber, horseshoer, plumber, nurse, and undertaker. In some jurisdictions the regulation of the latter occupations is deemed to have such a slight relation to the public health as

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<sup>28a</sup> Cf. Reinsch, *Readings on American State Government*, pp. 262-286.

<sup>28b</sup> For treatment of these subjects, see Chaps. XII and XIII below.

<sup>29</sup> *Dent v. West Virginia*, 129 U. S. 114 (1889).

to render invalid the attempt of the state to restrict them to such persons as are examined and licensed by a state board.<sup>80</sup>

### Liquor Legislation

The business of manufacturing and selling intoxicating liquor for consumption as a beverage has been deemed to have such an important effect upon the public health, safety, and morals as to require special regulation and even prohibition. The exercise of the police power with reference to the liquor traffic has been a continual progression. Starting with mild regulation, it developed into highly drastic and stringent regulation, and when this did not prove satisfactory, the final step of complete prohibition was taken. This last step, however, was really a series of steps, the first being taken in the localities under local option laws. State-wide prohibition followed, and, finally, by the Eighteenth Amendment, nation-wide prohibition was introduced. A step intermediate between regulation and complete prohibition is the state dispensary system, which existed in South Carolina for a while, whereby all private traffic in liquor is abolished and the state assumes a monopoly of the subject.

The provisions of the Eighteenth Amendment are supposed to be enforced by the concurrent legislation of the states and of Congress. This amendment does not invalidate state prohibition laws previously enacted, but, on the contrary, it makes them constitutional if they were not so already. Such laws were not invalid as taking property without due process of law, nor as taking private property for public use without compensation.<sup>81</sup> They were invalid to the extent to which they encroached upon the power of Congress to regulate interstate commerce, but the effect of this limitation was much reduced by Congress itself through the passage of the Wilson Act of 1890, which subjected all intoxicating liquor transported into

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<sup>80</sup> Cf. *State ex rel. Richey v. Smith*, 42 Wash. 237 (1906). It should be mentioned that a state cannot exclude persons from such professions as those of teacher and clergyman as punishment for past offenses, since this would be *ex post facto* legislation. *Cummings v. Missouri*, 4 Wall. 277 (1867).

<sup>81</sup> *Mugler v. Kansas*, 123 U. S. 623 (1887).

a state to the operation of the laws of such state enacted in the exercise of its police powers,<sup>32</sup> and the Webb-Kenyon Act of 1913, which prohibited the shipment, into a state, of liquor intended to be used in violation of state law.<sup>33</sup> The Eighteenth Amendment is the culmination of all previous liquor laws. The enforcement of that Amendment by the concurrent legislation of Congress and the states, embodying, as it does, the first important sumptuary legislation incorporated into the Constitution of the United States, is a task of great magnitude and difficulty.<sup>34</sup>

### Race Legislation

That the police power of the states with reference to the regulation of the civil rights of their citizens was not taken away by the Fourteenth Amendment was decided by the Supreme Court of the United States in the Slaughter House and Civil Rights cases.<sup>35</sup> Consistently with that Amendment, the states may, under their police powers, enact laws introducing or maintaining racial distinctions, provided they are not unduly or unreasonably discriminatory. The question has arisen principally in connection with the enactment of laws embodying racial distinctions in the public schools and in public conveyances. Separate public schools for the white and colored races have been established in a number of states, and there is no doubt as to the power of the states to make such separate arrangements, provided substantially equal facilities are accorded to each race. Where the number of colored children are few, a state may, under some circumstances, suspend temporarily a colored high school, while continuing to maintain a white high school.<sup>36</sup> In the Berea College case it was held that a state may prohibit the instruction of white and colored persons at the same time and place even in private educational institutions.<sup>37</sup>

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<sup>32</sup> 26 U. S. St. at L. 313; *In re Rahrer*, 140 U. S. 545 (1891).

<sup>33</sup> 37 U. S. St. at L. 699.

<sup>34</sup> See article entitled "Prohibition," by John M. Mathews, in *Encyclopedia Americana*, XXII, pp. 638, 639.

<sup>35</sup> 16 Wall. 36 (1873); 109 U. S. 3 (1883).

<sup>36</sup> *Cumming v. Board of Education*, 175 U. S. 528 (1899).

<sup>37</sup> *Berea College v. Commonwealth*, 123 Ky. 209; 211 U. S. 45 (1908).

With reference to racial distinctions in public conveyances, a state cannot require that persons of both races shall have the same privileges in public conveyances plying between two or more states, since this would conflict with the power of Congress over interstate commerce.<sup>38</sup> But a state may require a railroad to provide equal, but separate, accommodations for white and colored passengers on intrastate journeys, as this would not be a denial of the equal protection of the laws.<sup>39</sup>

Classification by race, however, may go too far. Thus, the residential block segregation ordinance of Louisville, Kentucky, was held invalid because it deprived members of both races of the right to live where they wished and of the right to sell property to a member of the other race, while it could not be sustained as preventing race riots or the depreciation of property.<sup>40</sup>

### Constitutional Limitations on the Police Power

The mere fact that a statute is in the nature of a police regulation does not give it validity if it is in conflict with the guaranties provided in the state and Federal constitutions for the protection of individual rights of liberty and property. The most important of such guaranties are those found in the Fourteenth Amendment to the Constitution of the United States providing that no state shall deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The term liberty, as here used, has been defined as meaning "not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any

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<sup>38</sup> Hall v. De Cuir, 95 U. S. 485 (1878).

<sup>39</sup> Plessy v. Ferguson, 163 U. S. 537 (1896). In the absence of statutory authority, a railroad may segregate the races even in interstate transportation. Chiles v. C. & O. Ry. Co., 218 U. S. 71 (1910).

<sup>40</sup> Buchanan v. Warley, 245 U. S. 60 (1917). On race legislation, see G. T. Stephenson, *Race Distinctions in American Law*, 1914, and C. W. Collins, *The Fourteenth Amendment and the States*, 1912, Chaps. V and VI.

lawful calling . . . and for that purpose to enter into any contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." <sup>41</sup> The term property includes not only that which is tangible but also intangible property, claims and franchises. By the "equal protection of the laws" is meant substantially the protection of equal laws and implies that no discriminatory legislation or action of a state is valid which singles out an individual, a corporation, or a class and regulates it in a different manner from other individuals or classes in equal or similar circumstances. The exercise of the police power by the states and municipalities is continually coming into conflict with these constitutional guaranties and gives rise to many adjudications by the courts, in which an attempt is made to keep a proper balance between the conflicting considerations of state power and of individual rights of liberty and property. But, as has been well said, "the boundary between the liberty of the individual and the police power of the state is an indeterminate zone rather than a definite line. It is not for the courts to draw that line, but only to call a halt when the legislature has passed over that zone." <sup>42</sup>

The extent to which the police power may be exercised and the constitutional limitations resting upon it may be illustrated in connection with the matter of zoning in cities. Thus, by a zoning ordinance of the city of Los Angeles, certain territory was declared to be residence territory in which certain establishments, such as public laundries, were prohibited. This ordinance, even though applying retroactively to laundries already established at the time it was passed, was held valid as a reasonable exercise of the police power to promote the comfort of the residents in that territory.<sup>43</sup> Another ordinance of the

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<sup>41</sup> *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

<sup>42</sup> E. Q. Keasby, "The Courts and the New Social Questions," 24 *Green Bag*, 120 (1912).

<sup>43</sup> *Ex parte Quong Wo*, 161 Cal. 220 (1911). The United States Supreme Court has upheld zoning ordinances in *Reinman v. Little Rock*, 237 U. S. 171 (1915), and in *Hadacheck v. Sebastian*, 239 U. S. 394 (1915). Cf. H. S. Swan, "The Law of Zoning," supplement to the *National Municipal Review*, October, 1921.

same city, however, which suddenly and arbitrarily changed the limits within which gas works might be operated was held invalid as a discriminatory and unreasonable exercise of the police power which amounted to a taking of property without due process of law.<sup>44</sup> It has also been held that the police power does not extend to the prohibition in certain sections of the city of establishments which do not injure or infringe the lawful rights of others, such as store buildings.<sup>45</sup>

Another constitutional limitation on the police power is found in that provision which forbids the states from passing any law impairing the obligation of contracts. Strictly construed, this provision would mean that when the state has entered into a contract, such as the granting of a franchise, it cannot change the terms of the contract, even in the exercise of the police power. The courts have been loath to take this position, however, and have held that the state cannot thus bargain away its police power, at least when exercised for the promotion of its fundamental social objects, health, safety, morals. Thus, an exclusive grant to a company to operate a slaughterhouse may be repealed in the interest of the public health.<sup>46</sup> On the other hand, the grant of the exclusive franchise to supply gas to a city has been held to be a binding contract which cannot be impaired through the exercise of the police power for the promotion of mere comfort and convenience.<sup>47</sup> In recent cases, however, the courts have evinced a more liberal attitude toward the police power when alleged to be in conflict with the contract clause, so that this clause now operates as a comparatively slight limitation on the police power.<sup>48</sup>

A further limitation of the police power of the states arises out of the fact that it cannot be exercised in regard to a subject

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<sup>44</sup> *Dobbins v. Los Angeles*, 195 U. S. 223 (1904).

<sup>45</sup> *State ex rel. Lachtman v. Houghton*, 158 N. W. 1017 (1916); *R. S. Wiggin*, "State Restrictions on the Use of Property," *Minnesota Law Review*, February, 1917, pp. 135-153.

<sup>46</sup> *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746 (1883).

<sup>47</sup> *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885).

<sup>48</sup> *Cf. Atlantic Coast Line Ry. Co. v. Goldsboro*, 232 U. S. 548 (1913); *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372 (1919); *Producers' Transportation Co. v. Railroad Commission*, 251 U. S. 228 (1920).

matter which, by the Constitution, has been vested exclusively in Congress. Thus, a state cannot regulate immigration to the United States, even though its regulations on the subject might be designed purely to promote the public health, because this is a subject assigned to Congress by virtue of its constitutional power to regulate foreign commerce.<sup>49</sup> Under its police power, however, the state can legislate regarding certain matters connected with interstate commerce in the absence of any Congressional regulations on the subject. Thus, the state may regulate the speed of interstate trains at crossings and the method of heating and sanitary conditions on such trains in the absence of Congressional regulations.<sup>50</sup> When Congress has acted, however, its regulations on a subject within its constitutional competence exclude those of the state on the same subject, and the state law cannot be saved by calling it an exercise of the police power.

## Conclusion

Although state functions have greatly expanded in the last half century, both in variety and extent, those of the National Government have expanded at an even more rapid rate and have invaded to some extent the sphere originally supposed to belong to the states. The Supreme Court of the United States has endeavored in some cases, as in the two recent child labor decisions,<sup>51</sup> to check the undue extension of national power, and to hold an even balance between the powers of the nation and the states. That court also decided definitely against the contention of the "New Nationalists" that the National Government has any power not expressly denied to it in the Constitution and not expressly granted to the states, if the states cannot exercise it effectively.<sup>52</sup> In spite of these checks, how-

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<sup>49</sup> *Henderson v. Mayor of New York*, 92 U. S. 259 (1875); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885).

<sup>50</sup> *Southern Ry. Co. v. King*, 217 U. S. 524 (1910); *New York, etc., Ry. Co. v. New York*, 165 U. S. 628 (1897).

<sup>51</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

<sup>52</sup> *Kansas v. Colorado*, 206 U. S. 46 (1907).

ever, it remains true that the trend is steadily in the direction of the increase of national power at the expense of the states. This tendency has been especially noteworthy in the field of economic regulation, for many of the economic phenomena to be regulated, such as railroads and large corporations, extend beyond the boundaries of the states and, in some cases, are nation-wide in extent. One insidious form of the extension of national control has been through conditional grants of money by the National Government to be spent in the states for such purposes as education, good roads, and public health. The conditions usually are that the states shall contribute an amount equal to the national grant and that these combined sums shall be spent in accordance with certain specifications and standards laid down by the National Government.<sup>53</sup> A recent phase of the extension of national power has developed in connection with the enforcement of the Eighteenth or Prohibition Amendment to the Constitution of the United States. This has necessitated the creation of a large body of national officials exercising police powers within the states. Although the states are given concurrent power to enforce the amendment, some of them, including New York and Wisconsin, have given evidence of an intention to leave the problem of enforcement to the National Government. This failure of the states to exercise their undoubted powers is likely to lead in this, as in other fields, to an increased extension of national control.

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<sup>53</sup> On this movement, see P. H. Douglas, "A System of Federal Grants-in-Aid," *Political Science Quarterly*, XXXV, pp. 255-271, 522-544 (1920); B. A. Arneson, "Federal Aid to the States," *American Political Science Review*, XVI, pp. 443-454 (1922); W. Thompson, *Federal Centralisation* (New York, 1923), pp. 86ff., 146ff.; A. F. Macdonald, *Federal Subsidies to the States* (Philadelphia, 1923); B. W. Warren, "Destroying Our 'Indestructible States'," *Atlantic Monthly*, March, 1924, pp. 370-378.



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## CHAPTER IV

### SUFFRAGE, PARTIES, AND ELECTIONS

THE ills of the body politic in America may be likened to growing pains which it must inevitably undergo while changing its public law and its political organization and methods so as to adapt them to changing economic and social conditions. It is not only the physical environment which is changing but also the prevalent ideals of democracy. Democracy, therefore, is a relative term—relative both as compared with political conditions and also as compared with the changing ideals and aspirations of the people. Since the ideal of democracy is continually changing, the means for obtaining more genuine democracy tend also to change from time to time. By the ills of the body politic therefore we mean nothing more nor less than maladjustment between the end toward which we aim and the means which are at hand for obtaining that end. Such maladjustment always exists to a greater or less extent. The extent to which the people see and feel this maladjustment measures the extent of their dissatisfaction with existing conditions and their desire for reform and progress. No sooner has one reform been attained than new needs are felt and new reforms are sought. What a century ago was considered a fair measure of popular control would now be considered extremely aristocratic. The measure of democracy dealt out to us in one generation does not suffice to satisfy the next and the means which were formerly found adequate to secure a fair measure of democracy begin to fail. The law of democratic progress, therefore, consists in the continual process of readjustment of political means and methods to political ends and ideals.

Conditions in America when the Federal Government was established were quite democratic when compared with those then existing in Europe, but as compared with present conditions in this country were oligarchical in character. Our idea

of democracy has changed. The framers of the Federal Constitution were distrustful of too much democracy. Roger Sherman declared that "the people immediately should have as little to do as might be with government." Hamilton had no faith in democracy. "The people, sir," he exclaimed, "the people is a great beast." Not all the men of the convention entertained the same views, but they are typical of the time. The result of this distrust of the people is seen in the framework of the government set up under the instrument they framed. Safeguards were established to restrict the power of popular majorities. Of all the personnel of the Federal Government only the representatives in the lower house of Congress were to be elected directly by the people. The process of amending the Constitution was made exceedingly difficult, and, in the process, the people were to have no direct participation. The Federal Constitution itself was ratified, not by the people, but by state conventions.

### The Right of Suffrage

Popular government is by no means a mere matter of suffrage rights and electoral forms, yet without these it can scarcely be said in any true sense to exist. It is important, therefore, to consider to what extent the people have been granted the right of suffrage, both as to the classes of persons who have become qualified to vote, and as to the classes of officers or measures that they may vote for. This right is not a natural right, but is one that must be acquired by legal conferment. From another point of view, it is also a duty which the voter owes to the state, and an office which he discharges. The only direct contact of the average citizen with the government is at the ballot box. Certain classes of persons have always been excluded from direct participation in public affairs. Those upon whom the right to such participation has been conferred may be called for distinction, the "political people," or "the people," *par excellence*. In theory, the latter were supposed to represent adequately the interests of those who were excluded from direct exercise of political rights. The Declaration of Independence laid down the doctrine that governments

derive their just powers from the consent of the governed. Theoretically, all governmental power and authority in the states rests in the people, or in that portion of the people who have acquired the privilege of exercising political rights, and the selection of all public officers rests, therefore, either directly or indirectly, upon popular authority. But at the time the Declaration was issued, and for many years thereafter, a considerable percentage of the governed had no direct voice in choosing the governors, and even those who were allowed to vote could do so for comparatively few officers. The ownership of property was the most usual requirement for the exercise of the privilege of voting, and religious qualifications were also found in some states.

At the beginning of the history of the states, we find that appointment was more frequently used than election as the method of filling offices in the state executive department. Under the first state constitutions of New York, Massachusetts, and Illinois, adopted in 1777, 1780, and 1818, respectively, the governor and the lieutenant-governor were the only state executive officers placed on the elective list. Under the Ohio Constitution of 1802, the governor was the only such officer on this list, and in most of the other early state constitutions the use of the elective method was similarly restricted. In determining the method of appointing the remaining state executive officers, however, the mistake was made of placing the power of appointment in the legislature, or, if it were vested in the governor, he was under the necessity of securing the confirmation of the senate to his appointment. Such methods of appointment led to log-rolling in the legislature, or a division of responsibility between the governor and the senate, or, in New York until 1821, between the governor and the council of appointment.<sup>1</sup>

### The Extension of the Power of the Electorate

The dissatisfaction with the appointive method of selecting administrative officers was also due to the so-called democratic

<sup>1</sup> Gitterman, "The Council of Appointment in New York," *Political Science Quarterly*, VII, p. 80.

wave which swept over the country at about the time of President Jackson's administration, and brought into operation nearly everywhere the elective principle in selecting administrative officers. Many such officers of statutory origin were made elective, and, in the various state constitutions adopted about the middle of the nineteenth century, the same principle was applied to the selection of the constitutional state officers of the executive department.<sup>2</sup> Thus, under the New York, Illinois, and Ohio constitutions of 1846, 1848, and 1851, respectively, most of the principal state executive officers were made elective. The selection of judicial officers was also generally brought under the same principle. The extreme to which the movement for the election of purely ministerial officers went is illustrated by the motion of Mr. Vance in the Illinois Constitutional Convention of 1847 that "there shall be elected by popular vote all the clerks required in the offices of the treasurer, auditor, and secretary of state."<sup>3</sup> This motion fortunately was not adopted, but the clerk of the supreme court was made an elective officer.

The democratic wave resulted not only in an increase in elective offices, but terms of office were shortened and elections became more frequent. New constitutions and constitutional amendments became nearly everywhere subject to ratification by popular vote. Property and religious qualifications were broken down, so that, by the middle of the nineteenth century, approximately universal white manhood suffrage was reached, extending, in some states, even to aliens. These results were due in part to the settlement of the West where social and economic distinctions were less marked than on the Atlantic seaboard. After having been brought about generally in Western states, they had a reflex influence upon suffrage qualifications as laid down by Eastern states. This development was also due in part to bitter strife between political parties,

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<sup>2</sup> To this general statement, however, New Jersey is an exception, for, under her constitution of 1844, which is still in force, the governor is the only elective state executive officer.

<sup>3</sup> Proceedings and Debates of the Illinois Constitutional Convention of 1847, *Illinois State Register* (Springfield), August 14, 1847, I, No. 29.

leading them to engage in the race for new voters who, they thought, would naturally affiliate with the party most active in securing their enfranchisement.

The idea that the election by popular vote of practically all the officers of the government is a fundamental principle of democracy and that the appointive method of selecting officers is a badge and token of autocracy became so deep-seated and widespread that any persons who opposed the idea were deemed almost guilty of *lèse majesté* or petty treason. Nevertheless, even at the height of the so-called democratic wave, some independent thinkers, who were comparatively indifferent to the results of their utterances upon their political fortunes, ventured to raise their voices in opposition. Thus, in the mid-century Constitutional Convention of Ohio, Mr. Archbold warned the members that "it was a siren voice that invited the people to take the immediate administration of all affairs into their own hands. . . . Some very great occasion might demand the employment of this extensive and ponderous machinery (election by the people); but to employ it on ordinary occasions would be like using a spit as big as a ten-acre field to roast a shoulder of mutton."<sup>4</sup> A member of the Pennsylvania Constitutional Convention of 1873, in opposing the proposition that the superintendent of public instruction be chosen by popular vote, declared that "the people are not at all times best qualified to judge of the fitness of a man for such a position," and added, "there is no case of responsibility at all attached to the people if they exercise their power of election, for the share that each one bears in the act is so small that it affects him little or nothing."<sup>5</sup>

### Negro Suffrage

The most radical single step taken in the extension of the suffrage during the nineteenth century occurred in 1870 with the adoption of the Fifteenth Amendment, which undertook, at

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<sup>4</sup> *Debates and Proceedings of the Ohio Constitutional Convention of 1850*, p. 93.

<sup>5</sup> *Debates and Proceedings of the Pennsylvania Constitutional Convention of 1873*, II, pp. 362, 363.

least theoretically, to introduce pan-racial suffrage. Prior to the Civil War the right of citizens to vote for state officers had been left entirely under the control of the states. As a result of the war the slaves were freed, and a feeling developed that they would not be able to maintain the civil rights incident to freedom unless they were also endowed with political rights, the most important of which was the right to vote. Consequently, in the second section of the Fourteenth Amendment, adopted in 1868, the attempt was made to secure the right of suffrage for the negroes through the operation of minatory inducements upon the states. Unless they granted suffrage to the negroes, they might be penalized by a reduction of their representation in Congress. This provision was impracticable and has never been put into operation. It had no effect upon the Southern states because they regarded reduction of representation as a lesser evil than negro suffrage. In order to secure the introduction of the latter, more drastic measures were necessary, and consequently the Fifteenth Amendment was adopted which prohibited the states from making any discrimination among citizens of the United States in the matter of voting, on account of race, color, or previous condition of servitude.<sup>6</sup> Congress was empowered to enforce the provisions of the amendment, and, as long as national power was exerted to this end, negroes were able to vote in large numbers, and, in some of the Southern states, secured control of the governments with the help of white adventurers, known as "carpet-baggers," with many resulting abuses.

When the force exerted by the National Government to maintain negro suffrage was withdrawn, the Southern whites quickly regained control of their state governments, and the exercise by negroes of the voting privilege was very largely suppressed. This was accomplished at first by intimidation and other irregular methods, but later legal methods of excluding negroes were adopted, so far as this was possible within the limitations of the Fifteenth Amendment. That amendment is not violated

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<sup>6</sup> J. M. Mathews, "Legislative and Judicial History of the Fifteenth Amendment," *Johns Hopkins University Studies in Historical and Political Science*, 1909.

unless discrimination on the specified grounds is shown to the satisfaction of the court. Unless this is shown the discrimination is presumably based on other grounds, and hence remains within the sole jurisdiction of the state.

The inference is sometimes made that when persons are prevented from voting and those persons are negroes, therefore the exclusion is on account of race, etc. Thus, in 1900, there were in South Carolina and Mississippi about 350,000 adult male negroes, but the aggregate number of votes returned in both states for the Republican presidential ticket was only about 5,000. From these facts the following conclusion has been deduced:

It is clear, therefore, that it has in fact been possible for the white inhabitants of some of the states . . . so to abridge the right of suffrage *on the ground of race and color* as to deny that right substantially to all negroes.<sup>7</sup>

As a matter of fact this may be true, but as a legal proposition it is a *non sequitur*. It is not only unwarranted to presume that because certain persons are excluded from the suffrage and those persons are negroes, therefore such exclusion is on the ground of race and color, but such a state of facts may, with equal plausibility, be explained on another hypothesis. It is hardly probable that any qualification that a state may set up will operate equally on both races. If there should be any qualification that approximately all white persons could reach but few negroes could, and that qualification did not involve some characteristic unmistakably distinguishing, or inseparable from, either race, then the negroes would not be excluded on account of their race. This view has received judicial support as follows:

There may be a conspiracy to prevent persons from voting having no reference to discrimination on account of race or color. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the latter. All such conspiracies are amenable to the state law alone.

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<sup>7</sup> Judge J. C. Rose, "Negro Suffrage: The Constitutional Point of View," *American Political Science Review*, J, p. 20.



To bring them within the [Fifteenth] Amendment, they must have for motive the race, etc., of the party whose right is assailed.<sup>8</sup>

It is true that if the discrimination is on account of some inseparable characteristic of the negro race, which distinguishes that race unmistakably from the white race, such discrimination is on account of race. But propensity to vote the ticket of a particular party is not such a characteristic. Hence, if practically all the negroes and practically no white men in a particular state are prevented from voting, the presumption may be quite as strong that the basis of discrimination is party proclivity as that it is race, color, or previous condition of servitude. If such is the case, the right secured to the citizen by the Fifteenth Amendment is not infringed.

The chief application of the principle that the discrimination prohibited by the amendment is that which is due solely to race, etc., is in connection with the so-called disfranchising constitutions which have been put into operation by several Southern states. In 1890 Mississippi adopted a constitution by which it was required that all voters should have resided one year in the election district, should never have been convicted of certain specified crimes, and should have paid all taxes for two years back, and be able to produce satisfactory evidence of having done so. Beginning with 1892, in addition to the foregoing requirements each voter must be able to read any section of the Constitution, or to understand the same when read to him, or to give a reasonable interpretation thereof.<sup>9</sup> There is nothing on the face of these provisions which discriminates against negroes as such. Objection might be made, however, to the wide discretion conferred upon election officers in administering the understanding clause. In 1898 this provision came before the Supreme Court of the United States for adjudication and that tribunal held that the state constitution and laws did not on their face discriminate between the races, and that "it had

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<sup>8</sup> U. S. *v.* Cruikshank, 1 Woods, 308, by Bradley, J., sitting on circuit. In *James v. Bowman*, 190 U. S. 127, the court intimated that the negroes who were prevented from voting were so prevented, not because they were colored men, but because they were voters.

<sup>9</sup> Sects. 241, 244.

not been shown that their actual administration was evil, only that evil was possible under them."<sup>10</sup> The decision was correct, since, in general, courts will not undertake to redress evils unless actual evils are shown.

In 1901 Virginia framed a new constitution which temporarily confined the suffrage to veterans and their sons, taxpayers, and those able to read and explain, or to understand and give a reasonable explanation of, any section of the constitution."<sup>11</sup> Under these provisions an election was held the following year for members of Congress. Before a case involving the legality of the provisions could be brought before the Supreme Court of the United States, certificates of election had been issued, and the persons elected had been admitted to the House of Representatives. That tribunal, therefore, dismissed the case on the ground that the thing sought to be prohibited had been done and could not be undone by an order of the court.<sup>12</sup>

By the Alabama constitution of 1902, the right to register prior to 1903 was confined to veterans and their descendants, and to persons who were of good character and understood the duties and obligations of citizenship under a republican form of government. After 1903, literacy and property requirements came into play, but those who had registered under the temporary plan were entitled to vote for life.<sup>13</sup> The constitutionality of these provisions being attacked in the Supreme Court of the United States, that tribunal refused to interfere, for the reason, among others, that the court could not secure an un-discriminating administration of the franchise provisions without directly supervising the election machinery in the state, and this it was not prepared to do. "Apart from damages to the individual," the court added, "relief from a great political wrong, if done . . . by the people of a state and the state itself, must

<sup>10</sup> *Williams v. Mississippi*, 170 U. S. 213.

<sup>11</sup> Art. II, Sect. 19.

<sup>12</sup> *Jones v. Montagne*, 194 U. S. 147; *Selden v. Montagne*, 194 U. S. 154. The court intimated, without actually saying it, that the most feasible means of correcting such elections, if illegal, would be through the power of the House of Representatives to judge of the qualifications of its members.

<sup>13</sup> Art. VIII, Sects. 180-187.

be given by them or by the legislative and political department of the Government of the United States.”<sup>14</sup>

In this case the court evinced an apparent desire to shift the duty of redressing such wrongs upon the political department of the Government. So far as Congress has given any positive indication of its attitude upon the subject, it has intimated that the matter is one for judicial settlement.<sup>15</sup> But the absence of Congressional legislation would in any case hamper the efforts of the courts in securing the practical enforcement of the Fifteenth Amendment. It is true that, in 1915, the Supreme Court held void the “grandfather clause” of the Oklahoma constitution,<sup>16</sup> and this caused similar clauses in other constitutions to fall. In general, however, the purpose of the disfranchising provisions of the Southern constitutions had already for the most part been accomplished. The letter of the Fifteenth Amendment is observed, but its spirit is violated. For this condition of affairs, Congress and the courts attempt to shift the responsibility to each other. The real reason behind the attitude of both Congress and the courts is the apathetic tone of public opinion, which is the final arbiter of the question. In the technical sense, the amendment is still a part of the supreme law of the land. But as a phenomenon of the social consciousness, a rule of conduct, no matter how authoritatively promulgated, if not supported by the force of public opinion, is already in process of repeal.<sup>17</sup> The failure of Congress to exercise the power apparently granted to it by the Fourteenth Amendment to reduce the representation of states in which negroes are prevented from voting is due, not only to the apathetic tone of public opinion on the matter throughout the country, but also to the following considerations: (1) it would be difficult to

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<sup>14</sup> *Giles v. Harris*, 189 U. S. 475.

<sup>15</sup> See House Report No. 1740, Fifty-eighth Congress, 2nd Session, p. 3.

<sup>16</sup> *Guinn v. United States*, 238 U. S. 347. This clause contained a literacy qualification, but exempted from its operation any person who had been entitled to vote prior to 1867, or the lineal descendant of any such person.

<sup>17</sup> J. M. Mathews, “Legislative and Judicial History of the Fifteenth Amendment,” *Johns Hopkins Studies in Historical and Political Science*, 1900, pp. 119-126.

determine the exact number of persons disqualified from voting by state law, for many persons, otherwise qualified, do not take the trouble to register, or if registered, fail to vote; (2) any plan of reduction would probably also affect some Northern states in which literacy qualifications are found; (3) there is some legal doubt as to whether the Fifteenth Amendment did not repeal the reduction-of-representation clause of the Fourteenth Amendment; and (4) the real contest in Southern states takes place in the Democratic primary from which negroes are largely excluded, and the Fourteenth Amendment does not apply to exclusion of voters from primaries held to nominate candidates for office.<sup>18</sup>

### Woman Suffrage

By the Nineteenth Amendment, adopted in 1920, the right of the states to make discrimination among citizens of the United States in the matter of voting on account of sex was taken away, and since then women have had the privilege of voting on an equality with men throughout the nation.<sup>19</sup> This was the greatest single step taken during our national history in the extension of the suffrage. It is true that women had voted to some extent before the adoption of the Nineteenth Amendment. In a considerable number of states they had been given the right of voting in certain local and school elections.<sup>20</sup> In several

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<sup>18</sup> R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923), p. 370, and *cf.* *Newberry v. United States*, 256 U. S. 332 (1921).

<sup>19</sup> This amendment has been held by the Supreme Court of the United States to have been validly adopted. *Leser v. Garnett*, 258 U. S. 130 (1922); *Fairchild v. Hughes*, 258 U. S. 126 (1922).

<sup>20</sup> Thus, by act of the Illinois legislature in 1891, women were granted the privilege of voting at elections for any officers of schools under the general or special school laws of the state, provided they possessed all the qualifications required of men voting in such elections. The act was passed in pursuance of the constitutional mandate laid on the legislature to provide a system of free schools. In providing for such a system the legislature could in its discretion select such method of choosing school officers as it might deem proper, and the qualifications of those voting for school officers need not be the same as those of electors as defined by the state constitution, except in the case of school officers named in that instrument. *Plummer v. Yost*, 144 Ill. 68.

states they had been given, by constitutional amendment, the full right to vote on an equality with men. In Illinois, where the constitution is especially difficult to amend, the legislature by act of 1913 extended to them the right to vote for all state and local officers of statutory creation, and this act was held to be constitutional, although, in Indiana, a similar act was held unconstitutional.<sup>21</sup>

The adoption of the Nineteenth Amendment was thus the culmination of long agitation and of a long series of state acts. These acts had been passed as a result of a growing demand for the suffrage on the part of the women themselves and of a growing perception on the part of the male electorate of the equal fitness of women for the vote. The process whereby the suffrage was extended to women was therefore a healthier one than that by which negro suffrage was introduced, for in the latter case there had been no widespread demand for the vote from the negroes themselves nor was there any widespread belief in their fitness to exercise it. The fact of woman suffrage has been so generally accepted that the arguments that were made for and against it before the adoption of the Nineteenth Amendment seem now of little more than academic interest. It may be mentioned, however, that one of the stock arguments often heard against woman suffrage, *viz.*, that women could not help defend the country in time of war, was effectually disposed of by the important services of women during the participation of the United States in the World War. Women have, on the whole, taken their new right quite seriously and have organized national, state, and local "Leagues of Women Voters" for the nonpartisan study of public and governmental questions. Some of those who are active in politics advocate aligning themselves with the feminist movement and favor the support of a separate Woman's Party, but the majority of women voters favor alignment with the existing parties.

As to the actual participation of women in the suffrage, only a comparatively small percentage of them voted in states where they were given a mere limited right to vote. This was due in

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<sup>21</sup> *Scown v. Czarnecki*, 264 Ill. 305; *Board of Election Commissioners of Indianapolis v. Knight*, 117 N. E. 565.

part to the relative unimportance of the officers for whom they were allowed to vote and in part to the indifference of the party organizations in getting out the woman vote. With the extension to women of the full right of suffrage, a much larger percentage of them naturally participated. It cannot be maintained, however, that the woman vote has had a very radical or fundamental effect upon elections. Its influence upon the fortunes of the political parties is not perceptible. On general party lines, the women generally vote substantially as the men do, swelling in about equal proportion the total vote cast for the candidates of each of the major parties, but not changing the result of the election. In elections, however, where party lines are largely obliterated and issues are involved having a moral aspect, the influence of the women has generally been more decided. There are also evidences in some states that the potential woman vote has influenced the legislatures to take a more favorable attitude toward proposed legislation designed especially for the benefit of women.

### General Qualifications for Voting

The classes of persons who are legally excluded from voting have been reduced at present, practically speaking, to almost an irreducible minimum. Grounds of disqualification found in different states for exercising the right to vote include lack of residence, lack of citizenship, minority,<sup>22</sup> illiteracy, failure to pay poll taxes, and conviction of an infamous or other crime. These are also usually grounds for exclusion from eligibility for holding public office. In general, with few exceptions, the qualifications or disqualifications prescribed for voters in state elections apply equally to national and local elections. The usual residence requirements are that a person, in order to be a voter in any election, must have resided in the state one year and for lesser periods in the county, city and election district. In order to constitute a residence, a "permanent abode" is necessary. What is meant by a "permanent abode" has been defined by the

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<sup>22</sup> The age of majority is invariably twenty-one years, but if a person reaches his majority before election day, he is usually allowed to register before that time.

courts as depending largely on the person's intention or *animus manendi*, and this may be shown both by his declarations and his acts. Absence even for years, if the party all the while intends it as a mere temporary matter, is not an abandonment of residence.<sup>23</sup> A number of states have passed laws by which voters who are absent from their voting districts on election day on account of business or other duties may have their votes counted by mailing their ballots to the election officers. Provision is also usually made for absent voting by qualified voters enlisted in the military service of the state or of the United States.

The great majority of states now require that, in order to be eligible to vote, a person otherwise qualified must be a full-fledged citizen of the United States, so that a mere declaration of his intention to become a citizen through the process of naturalization is not sufficient. A very few states permit an alien who has taken the first step in the process of naturalization to vote, if otherwise qualified, but the number of such states is dwindling. A number of states also have an educational or literacy test for voting. The first educational test was adopted in Connecticut in 1855 and required ability to read. Massachusetts followed two years later, requiring ability to read and write. In some Southern states, as already indicated, understanding clauses have been adopted for the purpose of cutting down the size of the negro vote. The Massachusetts or office-column form of ballot, as found in some states, is also a literacy test to a slight extent, since the ballot cannot ordinarily be voted

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<sup>23</sup> *Krcitz v. Behrensmeyer*, 125 Ill. 141; *Moffett v. Hill*, 131 Ill. 239. Under the Constitution of Illinois, "no elector shall be deemed to have lost his residence in this state by reason of his absence on business of the United States or of this state, or in the military, or naval service of the United States." Art. VII, sect. 4. With respect to the right of a college student, otherwise qualified, to vote, the rule has been laid down in Illinois that he "may vote in the place where the college is located if he is free from parental control, regards the place where the college is located as his home, and has no other home to which to return; but his mere presence at the college is not sufficient, as his residence must be *bona fide*, with no intention of returning to his parental home after completing his studies." *Welsh v. Shumway*, 232 Ill. 55.

except in a haphazard manner without some slight ability to read. In 1922 New York adopted a literacy test, requiring ability to read and write English.<sup>24</sup> About twenty states have now some form of educational or literacy test. The education of voters in the duties of citizenship is one of the greatest needs in improving the quality of the electorate.

### The Party System

The influence of the electorate in choosing officers and passing upon public questions is not usually exerted *en masse*, but only through groups of voters organized into political parties formed for the purpose of influencing the elections to public office and of gaining control of the machinery of government. Although there are usually several minor parties and occasionally some third party becomes powerful enough to exercise an important influence in the elections, yet ordinarily there are but two major parties, one in power and one in the opposition, or dividing between them the control of the different branches and offices of the government. Proportional representation, which has now been adopted in some cities, has not yet been tried out in state-wide elections.<sup>25</sup> If applied to elections for members of the state legislature, it would undoubtedly tend to encourage minor parties. On the other hand, the prevalent practice of majority or plurality elections favors the continuance of the two party system.<sup>26</sup>

The party system is due not merely to a combative instinct among groups of people, but parties ordinarily represent divergent views as to the management of public affairs, and help to

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<sup>24</sup> F. G. Crawford, "The New York State Literacy Test," *American Political Science Review*, May, 1923, pp. 260-263.

<sup>25</sup> Proportional representation must not be confused with preferential voting, which is a method of making second or other choices count. On the other hand, it must also be distinguished from the system of minority representation as used for the election of the members of the lower house of the Illinois legislature.

<sup>26</sup> By constitutional amendment adopted in 1908, Oregon authorized her legislature to provide "for elections by equal proportional representation of all the voters for every office which is filled by the election of two or more persons whose official duties, rights, and powers are equal and concurrent." Art. II, Sect. 15.



define the issue in elections even though there may be many varieties of views within the ranks of the same party. It is true that there is much reason for the view that, although parties divide originally on real issues, they are later perpetuated by inheritance, and it has been estimated that probably ninety per cent of the voters derive their party affiliations, just as they do their religious affiliations, from their parents or by inheritance from the environment in which they find themselves. Pessimistic observers, such as Ostrogorski, have declared that parties endeavor to control the government for the sake of the spoils and that party organizations are held together by the "cohesive power of the public plunder." There is doubtless some measure of truth in this view. The political party has sometimes been transformed and perverted into an agency for controlling and distributing offices and contracts for the benefit of the party machine. But party organizations are necessary in a democracy. The prevalence of the long ballot and of the principle of separation of powers in our government has necessitated a stronger organization of political parties and greater activity on their part than would otherwise be the case. The parties have assumed the functions of filling the numerous elective and appointive offices and of forming a connective tissue to bind together the separated departments of government.<sup>27</sup> Through the exercise of these functions the power of the political party has become so great as to be the controlling force in the government. Hence, in order that the people may control their government, it is necessary first that they control the organization which in turn controls the government.<sup>28</sup> The realization of this fact has led to a movement for the democratization of the political party and for the legalization of its machinery. Formerly, the political party was regarded as a voluntary association of private individuals similar to a religious sect, and therefore not a proper subject of legal regulation. This view, however, is no longer held and the political party is now regarded as a public or governmental agency which is an appro-

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<sup>27</sup> Ford, *Rise and Growth of American Politics*, p. 215.

<sup>28</sup> McLaughlin, *The Courts, the Constitution and Parties*, p. 158.

appropriate subject of legal regulation.<sup>20</sup> Many of the operations of the party system have now been brought under legislative control through the enactment of elaborate statutes. It is still to be borne in mind, however, that these statutes have been passed by legislatures over which the party organizations exerted much influence, and the effect of this influence may be seen in many provisions or lack of provisions in the statutes.

The movement to subject political parties to legal regulation has involved the formulation of a definition of a political party. This became especially necessary in connection with the introduction of the uniform Australian ballot, prepared and printed at public expense; for the question at once arose as to the method of determining what names should be printed on the ballot as the candidates of the several political parties. To print upon such official ballot the names of candidates in accordance with a mere certificate of nomination, caused to be filed with the proper official by a convention or other body representing an association of qualified voters, is in itself a recognition that such association of voters constitutes a political party. Thus, it frequently was provided that an association of voters which polled a certain percentage of the vote at the next preceding general election should have the privilege of certifying the names of its candidates to a designated officer to be printed upon the official ballot. The percentage rule embodied, of course, an arbitrary limitation, and it might happen that an association of voters having all the other essential characteristics of a political party might fail to poll the required percentage of votes. In such a case, however, nomination of candidates might usually be made by petition.

The state party system is largely merged with that of the nation. Although some minor parties have been confined to particular states or sections of the country, the two major parties feel it necessary to maintain nation-wide organizations. The states are merely links in the chain of national party organization. There are few purely state issues on which

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<sup>20</sup> The older view, however, came close to being adopted by the majority of the Supreme Court of the United States in the *Newberry* case, 256 U. S. 232 (1921).

parties divide and national issues are usually injected into state political campaigns. State party platforms frequently contain planks relating to national matters, such as tariff, the currency, or the League of Nations, with which the state governments have nothing directly to do. The absence of distinctive state parties is due in part to the common practice of holding state and national elections at the same time and in part to the necessity under which the national parties labor of getting control of the state governments in order to be able to carry out their national policies. The national character of the party system has a unifying effect, but it is unfortunate in that it tends to confuse state with national issues and to distract the attention of the voters from state governmental problems which need for their proper solution the careful and undivided consideration of the voters of the state.

In the solution of these problems, political parties are more likely to follow the trend of opinion than to take a position of leadership. Party organizations are frequently lacking in the moral courage necessary for effective leadership. This is due in part to the heterogeneity of their membership, which renders it likely that the adoption of any positive policy will probably alienate the support of some class of voters. Such lack of leadership however, may itself alienate the more intelligent class of voters, and force them to look to other agencies, such as leagues, granges, chambers of commerce, labor unions, societies and other voluntary organizations as more effective means for influencing legislative and executive action. There are many evidences that party regularity is less highly regarded than formerly. Since the introduction of the direct primary, as will be seen, popular revolt against unenlightened machine domination has been rendered more easy. Disregard of traditional party lines has been especially noteworthy in Western and Northwestern states, where such movements as those represented by the Progressive Party and the Nonpartisan League have secured an especial hold upon many voters, and have tended, temporarily at least, to split very badly the membership of the major parties.

In regard to questions of foreign policy and especially in times of war, party lines are usually less closely drawn. There is a widespread feeling which is summed up in the statement that "party politics should stop at the water's edge." The difficulty in carrying out this principle, however, is that it is not usually possible entirely to dissociate questions of foreign from those of domestic policy, and, certainly, the principle is not put into practice except in time of war when there is an obvious necessity for subduing party contests in order to present a united front to the enemy. The disintegration of the party system during war is only temporary, however, and after peace is restored, or the crisis past, there comes about a recrudescence of party politics.<sup>80</sup>

### Party Organization and Platforms

In endeavoring to accomplish the purpose of gaining control of the machinery of government, the political parties undertake to nominate candidates for office, to draw up platforms of principles, and to create and maintain permanent party organizations.

Although party contests are fought with "ballots rather than bullets," they resemble battles in the respect that, other things being equal, the side having the most efficient organization usually wins.<sup>81</sup> Party organs may be divided into two classes, temporary and permanent. The temporary organs are the convention and the primary, while the permanent organs consist of various grades of committees. For the purposes of state party organization, the state convention stands at the apex, but district and county conventions are also sometimes held. Theoretically, at least, the convention has paramount authority over the party committees, but the latter, on account of their permanence and of the fact that they sometimes have charge of the

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<sup>80</sup> On the influence of war on political parties, see the author's article, "Political Parties and the War," *American Political Science Review*, May, 1919, pp. 213-228.

<sup>81</sup> Sometimes, through a bipartisan combination or understanding between the organizations of the two major parties the party battle degenerates into a mere sham battle.

arrangements for holding the convention, may practically control it to a considerable extent. The state convention is constituted in either of three different ways: first, its members are chosen by county conventions in some states; secondly, in other states they are elected by the voters of the party at direct primary elections; or, in still others, the state convention consists of the candidates of the party for state and other offices, occasionally acting in combination with other members designated by law. Representation in the state convention is based upon the county or upon some more artificial district, and delegates are apportioned either according to population or according to the party vote in the respective districts. As a rule, the state convention is a much larger body than the state legislature, and also differs from the latter in following the unicameral plan of organization.

The powers of the convention may be classified as legislative, judicial, and executive. Its legislative power consists in the formulation, adoption, or promulgation of the party platform of principles, and in drawing up the by-laws of the party and the rules of procedure, except in so far as these matters are regulated by state law. In the exercise of its judicial, or more properly, quasi-judicial power, the convention, through its committee on credentials, decides which of two contesting delegates, or sets of delegates, to seat. That delegation which will support the faction in control of the convention is usually seated without much consideration of the merits of the contest, but sometimes, out of regard for party harmony, both delegations may be seated, each member being accorded a half vote. The executive or administrative functions of the convention consist in the election of members of the party committees and in the nomination of candidates for offices to be filled at the polls. Since the introduction of the direct primary, however, as will be seen, these functions of the convention have been very largely taken away from it.

The permanent organization of the party consists of a hierarchy of committees, corresponding to the various units of government, state, congressional or senatorial district, county, city, ward, and precinct. An organization as elaborate as this,

however, is found, as a rule, only in close or doubtful states and not in those where the result of the election is largely a foregone conclusion. These committees have regular charge of party affairs and their most important function is the conduct of campaigns for the election of the party nominees. This unity of aim binds together the otherwise loosely articulated group of committees and insures, as a rule, efficient coöperation between them. The machinery of coöperation may be lubricated by liberal applications of campaign funds. The state central committee usually elects its own chairman and other officers, and, if not prohibited by law, may also appoint an executive committee from its own membership. The size of the state committee varies considerably in different states, and, where it is large and unwieldy, the actual control naturally tends to gravitate into the hands of a few members, or the committee may even be controlled by a party boss, who is not a member of it. An attempt to prevent this is sometimes made in the law by a provision that the committee shall not have power to delegate any of its powers or functions to any other person, officer, or committee.<sup>32</sup> The composition of the party committees, formerly determined by rule of the committee itself, is now frequently regulated by law. Thus, in Illinois under the direct primary election law, it is provided that the state, senatorial, and precinct or ward committees shall be elected by the primary electors of the respective parties. State central committeemen are elected by the primary electors of each party, voting by congressional districts. The county and city central committees consist of the precinct and ward committees, if any, within their respective territorial limits, while the congressional district committees are composed of the chairmen of the county central committees of the counties composing such district.

With the adoption of the Nineteenth or Woman Suffrage Amendment, some efforts have been made by the party organizations in different states to accord women representation on the party committees. However, even in those cases where they

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<sup>32</sup> *E.g., Hurd's Revised Statutes of Illinois*, Chap. 46, Sect. 460.

have, nominally at least, equal representation, the men, on account of their greater experience and familiarity with the conditions of political activity, usually control the work of the committee. Women are now sometimes sent as delegates to party conventions, but are more usually accorded the empty honor of being named as alternates. The influence of women in party politics has been increased by the introduction of the direct primary election, in which they participate to a greater degree than they do in the work of party conventions and committees.

As pointed out above, the state convention, as a rule, draws up the party platform of principles. This function may in reality consist merely in the adoption of a draft of the platform submitted by the committee on resolutions, which, in turn, may have received it from some influential party leader. Planks are usually inserted to meet the wishes of any considerable number of voters in the party. In order not to say anything that might displease any group of possible party supporters, the framers of the platform usually succeed in making it a well-sounding but largely meaningless document. Nowadays it is not ordinarily regarded as of much importance. Its decadence is one indication of the partial disintegration of the party system in the states. In the movement for the legalization of party activities, some distrust has been shown toward the convention as the agency for drafting the platform. In many states, even when the function of nominating candidates has been largely transferred from the convention to the direct primary, the convention still retains its power of drawing up the platform. This distribution of functions, however, may bring about a divergence in views between the candidates nominated in the primary and those of the convention as expressed in its platform. If the convention meets after the primary in which candidates have been nominated, such nominees may be consulted by the convention in drafting the platform. But the convention may be held before the primary. Some states have transferred the function of drafting the platform from the delegate convention to a party council composed of the candidates for state office. With these candidates may be associated certain state executive officers, hold-over members

of the legislature, and members of party committees, or the state committee may alone be intrusted with this function.<sup>33</sup>

### The Nomination of Candidates

Since the party exists, theoretically at least, for the purpose of impressing the views of its members upon the conduct of the government, one of its most important aims is to secure control of the policy-determining offices, and, considering merely the matter of spoils, it may endeavor to secure control of all offices without regard to whether they are policy-determining or not. As preliminary to the election of officers, an important step is the nomination of candidates. No matter what may be the form of organization, whether a church, a club, or a political party, if officers are to be elected, it is necessary for the mass of the voters to have some guidance in casting their ballots. Otherwise, the results would usually be too scattering to be decisive or adequately expressive of group opinion. This guidance the party endeavors to give through the development of some process of nominating candidates. About half of the states of the Union may be safely described as essentially one-party states, and in such states the nominating process assumes special importance, since nomination is generally equivalent to an election.

Originally, nominations for office were sometimes made by mere self-announcement of the candidate, but this method was naturally suitable as a rule only for small or primitive communities where every man was acquainted with every other. Prior to about 1830, candidates for state offices were usually nominated by a legislative caucus, composed of the members of the

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<sup>33</sup> R. S. Boots, "Party Platforms in State Politics," *Annals of the American Academy of Political and Social Science*, March, 1923, p. 72. In South Dakota, under the Richards primary law, "proposal men" are elected to draft the platform, and also to formulate the "paramount issue." C. A. Berdahl, "The Operation of the Richards Primary," *ibid.*, p. 158. The platform is really adopted by the party voters from the proposals formulated by the proposal men. They also name candidates, *Ibid.* On the influence of party platforms on legislation in Indiana, see B. Y. Berry's article in *American Political Science Review*, February, 1923, pp. 51-69.



party in the state legislature, who assumed to act as the representatives of their party in this capacity. On account of the lack of railroads and easy means of travel at that period, special nominating conventions could have been assembled only with difficulty. The legislative caucus, however, was not looked upon with favor because it seemed to give too much power to the legislative branch over the other branches of the government and thus violated the spirit of the principle of separation of powers. Moreover, the legislative caucus was not fully representative of the rank and file of the party because there were some districts in which the minority party had no representatives in the legislature. To remedy this defect, delegates were sometimes chosen from such districts to meet with the legislative caucus and this was known as the mixed caucus. Gradually, this developed into a body of specially elected delegates, known as the delegate-convention, which became, during the whole nineteenth century after about 1830,<sup>84</sup> the prevailing agency of the party for nominating its candidates for state office.

In theory the convention was a representative and deliberative body. As its basis there existed the caucus or indirect primary, which consisted of a general gathering of the voters in a particular community. It might directly nominate candidates for local offices, but for the purpose of nominating candidates for the higher offices, the caucus usually elected delegates to a convention which performed this function. In the case of the state convention, the process was sometimes made still more indirect through the election of delegates to an intermediate convention, which, in turn, elected delegates to the state convention. A number of abuses grew up in connection with the indirect primary which caused it to fall into disrepute among good citizens. It fell under the practically complete control of the party machine. It was packed with adherents of the party boss and its proceedings were cut and dried. "Snap" or "soap box" primaries were sometimes held in halls of insufficient capacity and with inadequate notice.

The power of the party machine over the nomination of can-

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<sup>84</sup> State conventions were held occasionally before this date, *e.g.*, in Pennsylvania in 1788.

didates for office under the convention system was also frequently so extensive as to lead to grave abuses. "Slates" or lists of candidates were made up in advance, and the convention, frequently amid disorder, ratified the choices already made. The delegates to the convention thus ceased to be representatives of the rank and file of the party and were sometimes mere dummies acting under the domination of the boss or of a small group of leaders.

If, by chance, some independent delegates endeavored to protest against these arbitrary proceedings, the steam roller made its appearance and the presiding officer gaveled through the prearranged program. The members of the convention were sometimes in large part drawn from the lowest class of persons in the community. Thus, of the more than seven hundred delegates to a Cook county, Illinois, convention which met in 1896, it is said that 265 were saloonkeepers, 148 were political employees, 84 were ex-Bridewell and jailbirds, and 43 had served terms in the penitentiary for murder, manslaughter, or burglary.<sup>35</sup> Although this instance was doubtless an extreme one, it is not surprising that nominations made by such conventions were unsatisfactory to the mass of the voters.

Another method of nomination which is sometimes found independently is that by petition signed by a certain number of qualified voters and filed with a designated officer. The filing of petitions is also a step in the procedure of the direct primary election, which has now become the prevailing method of nominating candidates for office.<sup>36</sup>

## The Conduct of Elections

As preliminary to the holding of an election whether primary or general, it is now nearly everywhere considered necessary to make up a list of voters who are qualified to participate in such election. Without such a list it would be difficult on election day, except perhaps in rural districts, to discriminate between qualified voters and others attempting to vote who are not

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<sup>35</sup> Ray, *An Introduction to Political Parties and Practical Politics* (rev. ed.), p. 128.

<sup>36</sup> For description of the direct primary, see next chapter.

qualified. In smaller communities the judges in each precinct frequently constitute a board of registry which meets at stated times before elections for the purpose of making a list of the qualified voters of the precinct. Names of such voters, however, who are omitted from the list may sometimes be sworn in on election day. In cities and larger communities, however, the method of personal registration is followed, and unless a voter appears in person and registers on the stated days provided for this purpose he cannot vote on election day even though otherwise qualified. These precautions are necessary to prevent repeating and impersonation in places where the number of voters is so large that the judges of election cannot be personally acquainted with them. In some of the larger cities, provision is now made for a central registration place which remains open for the convenience of voters between general registrations.

A would-be voter, in applying to the registration officers for a place on the list of voters, may be required to furnish evidence that he is legally qualified to vote, in respect to age, residence, citizenship and other requirements. For the benefit of those voters who may not wish to disclose their exact ages, New York permits a voter over thirty years of age to state his age in that indefinite form. In a number of states, such as Louisiana and Mississippi, having educational or "understanding" requirements, a large degree of discretion rests in the registration officers, which may be abused. In order to prevent inequitable administration, such requirements should be made as far as possible automatic in operation. When a voter's name has once been placed on the registration list, it is sometimes permitted to stay there until he dies or removes his residence. This plan requires periodic revision for the purpose of eliminating the names of deceased or removed persons, but, since such revision is frequently neither complete nor up-to-date, many states and cities now require periodical re-registration by the voter himself. Such strict registration requirements may operate as virtually an additional qualification for voting and may have the effect of excluding from the polls a considerable percentage of otherwise qualified voters. It is generally agreed, however,

that, in most communities, such precautions are necessary in order to safeguard elections from fraud.

After registration has been completed the primary and general elections follow as the next steps in the process of choosing public officers. Originally, the regular local officials were utilized for the purpose of holding such elections. These officials were naturally partisan, and, while this circumstance did not produce serious abuses in rural communities, it became increasingly more unsatisfactory with the growth of population, so that, at present, the practice is generally followed of appointing special election judges and clerks, who should be and usually are the same officers as those who make up the lists of registered voters.

The provision for specially chosen election officials makes possible the introduction of the principle of bipartisanship in the conduct of elections, the expectation being that the presence at the polls of representatives of different parties will prevent frauds and other abuses which might otherwise be perpetrated. This plan works fairly well as a rule, unless the interests of the major party organizations coincide, in which cases the interests of the public may suffer. The minor parties are not usually accorded representation in the body of election officials, but each party is ordinarily allowed a watcher at the polls who may challenge would-be voters whom he considers not to be qualified.

Safeguarding the purity of elections is a fundamental desideratum in a democratic government, and the function of election officers is correspondingly important. In view of this fact, surprisingly little attention has been paid to improvement in the method of their selection. Such positions are frequently distributed by local party leaders to ward heelers and other party workers on the basis of party service. A small beginning was made in New Jersey, however, toward placing the selection of election officers on the merit basis.

Election officials are appointed for each precinct, which is the lowest grade of election district and is composed of only a few hundred voters. Above the precinct are the ward, city, township, county, Congressional, legislative and judicial districts, and the state. Since state officers are usually chosen at the same

elections at which local officers are chosen, these elections are consolidated and the state utilizes the machinery of local election officials for the purpose of holding the election of its own officers. After the polls have closed the ballots are usually counted by the local election officials in the separate precincts. Some states, however, have now provided for special central boards in cities and counties to have charge of counting the ballots. After the ballots are counted they are put in boxes and sealed and statements of the results of the count transmitted either directly or indirectly to higher officers or canvassing boards. There is usually a state canvassing board, consisting of *ex officio* members, which tabulates the returns for state officers, and certificates of election are then issued to the successful candidates. If the candidate defeated on the face of the returns disputes the legality of the certificate as thus issued, he may bring a contest in the courts. The legislature, however, decides contests in the case of the election of its own members, and sometimes also in the case of the election of executive officers.

The percentage of qualified voters who actually go to the polls is difficult to determine accurately. It will naturally vary with the importance of the election and the extent of popular interest in its outcome. From this point of view the largest percentage of the voters is naturally expected to participate in presidential elections. Yet it is estimated that, in the presidential election of 1920, out of 49,000,000 qualified voters, 13,000,000 or 26.6 per cent neglected to vote.<sup>37</sup> State and local officers were also chosen at the same time. In purely state and local elections, the percentage voting would usually be still smaller.<sup>38</sup> In order to increase the number of actual voters, it has been suggested that compulsory voting laws be passed, providing some form of penalty for failure to vote. North Dakota and Massachusetts, by constitutional amendments adopted in 1898

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<sup>37</sup> R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923), p. 411.

<sup>38</sup> In Colorado, it was found that from 71 to 77 per cent of the voters participated in presidential elections, and from 55 to 72 per cent in the intervening elections. R. C. Spencer, "Activities of the Colorado Electorate," *American Political Science Review*, February, 1923, p. 101.

and 1918 respectively, authorized their legislatures to pass such a law. Even if most delinquent voters could be coerced into voting by such a law, they could not be compelled to vote intelligently. It is not mere voting which is desired, but intelligent voting; and this is to be secured not by compulsory voting laws, but by more widespread education of the electorate in the duties of citizenship.

Assistance should be rendered by law, however, to voters who would vote if they could, but are prevented from doing so by absence for good cause from their places of residence on election day. There are many thousands of persons whose business or occupation frequently place them in this predicament. The large majority of states have now undertaken to provide for such cases by the passage of absent voting laws. These laws apply both to civilians and to persons absent on military or naval service. In the latter case especially, the voters may usually be anywhere in the United States but only one or two states permit him to vote while absent from the country. Most of the laws allow the absent voter to secure a ballot and mail it to the local official before election day. In order to guard against fraud, certain formalities have to be complied with by absent voters which place upon them such a burden that comparatively few of them avail themselves of the privilege of voting.

The large number of elections places a rapidly increasing burden of expense upon the taxpayers. The salaries of judges and clerks, the rent of polling places, the printing of ballots and other items amount to a very considerable sum. This is especially true since the introduction of direct primary elections and registration days. A saving in expense might be effected by consolidating registration and primary days or by combining certain elections which are now scattered through the year. A few states have consolidated practically all elections during the year into one. This plan, however, unless combined with the short ballot, places upon the voter too great a burden in making so many choices at one time, which is more serious even than the financial burden. Although a reduction in the number and expense of elections is highly desirable, this should not be done

in such a way as still further to confuse the issues and the voters. Some expense might be saved by combining certain elections in which the issues are not greatly different, by the general introduction of a system of permanent or central registration, and by abolishing the direct primary election in certain cases and nominating candidates by petition. Some direct primary elections might be dispensed with through the introduction of proportional representation, but the only thoroughgoing solution of the problem is the introduction of the short ballot.

There has been much criticism of the large amounts of money spent by candidates and party organizations in order to win elections. In 1913, for example, the governor of Illinois declared that "candidates have concededly spent in election contests more than twice the salary they could collect during the whole term of their office," and he recommended the passage of an act "which will limit, within reasonable restrictions, the expenditure of money during a political campaign, and compel the publication of all amounts collected and expended both before and after election."<sup>39</sup> Laws which aim to accomplish these purposes had already been passed in a number of states, and their need had been indicated by revelations of wholesale bribery and other corrupt practices in different parts of the country. Their provisions may be classified into various groups. In the first place, there are limitations on the sources from which funds may be derived for campaign purposes, contributions from corporations being frequently prohibited. In the second place, the amount of money which may be spent is limited either to an arbitrary sum, or to an amount proportional either to the salary of the office sought or to the number of voters in the election district. Thirdly, there are found limitations on the purposes for which money may be spent. Bribery in its cruder forms is nearly everywhere prohibited, especially on election day, and sometimes the furnishing of transportation to and from the polls is restricted, although the latter practice in many states is not illegal. Purposes of expenditure generally considered legitimate are the hiring of speakers, renting halls, printing campaign literature,

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<sup>39</sup> Inaugural Address of Governor Dunne of Illinois, 1913, p. 8.

and advertising. In the fourth place, limitations are sometimes found upon the manner of handling campaign funds, unity of expenditure through official treasurers being required in order to fix responsibility. These laws, however, are not very effectively enforced, and herein lies their weakness. Dependence for enforcement is usually had upon publicity. Financial statements are required to be filed either before or after the election, and although failure to file such a statement or the filing of an incomplete statement may be a punishable offense, it is seldom that any prosecutions are instituted for such offenses.<sup>40</sup> Effective enforcement of these laws is hardly to be expected so long as the temptation to evade them is so great.

### Ballot Forms

Prior to the introduction of the Australian ballot over three decades ago, the ballots used at elections were printed and furnished by the party organizations or candidates. Naturally, a party printed on its own ballot the names of no candidates except its own. The ballots of each party, moreover, were apt to vary in size, shape, and color. Consequently, it was practically impossible for a voter to vote a secret ballot. This situation resulted in various abuses. Bribery was facilitated because the bribe-giver could determine without difficulty whether the bribe-taker "delivered the goods." In addition to actual bribery, personal and political pressure and economic intimidation could be brought to bear upon the voter so as to prevent him from exercising a free choice. The stuffing of ballot boxes was also facilitated. The seriousness of these abuses led to the introduction of the Australian ballot in nearly all the states.

Although there are various types of this ballot in use, a feature common to all of them is that it may be voted secretly. This is insured not only by the provision of booths at the polling places, but also by the fact that the official ballots, which are printed at public expense, are uniform in size, shape, and color, and contain the names of all candidates of the various parties who have been nominated for the various offices. It has some-

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<sup>40</sup> Merriam, *The American Party System*, 336-339.



times been denounced as un-American that the "sovereign" voter should sneak into a booth to mark his ballot, as if it were something of which he were ashamed. However true this may be theoretically, experience has shown that in practice the secrecy of the ballot is necessary in order to prevent undue influence or illegitimate pressure from being brought to bear upon the voter so as to deter him from exercising the free and untrammelled right to vote according to the dictates of his own conscience. In order further to accomplish this purpose, electioneering within a certain distance of the polls is usually prohibited. Although sample ballots may be distributed before the election or be published in newspapers, the official ballot, endorsed with the initials of one of the election judges, may, except in the case of absent voters, be obtained by the voter only at the polls on election day. Since a voter has a right to vote for the candidate of his choice and is not confined to those whose names are printed on the ballot, he may write in the name of his own candidate in a blank space on the ballot, and, by placing a cross mark in front of it, have it count as a vote for such candidate, although the latter would ordinarily have no chance of election. If a qualified voter, by reason of illiteracy or physical disability, is unable to mark his ballot, he may be assisted in doing so in most states by two of the election officers, of different parties. Judges of election, canvassing boards, and courts will ordinarily refuse to count any ballots which are marked in such a way as to distinguish them from others, so that a bribe-giver may be able to know that the votes which he bought were delivered. As a rule, however, the courts will endeavor to avoid disfranchising a voter on account of slight inaccuracies in his ballot, and will give effect, as far as possible, to the intention of the voter as expressed in his ballot, within the forms prescribed by law.<sup>41</sup>

Two main types of the Australian ballot are found in different states, known as the Massachusetts and the Indiana forms. There are also various combinations of these two forms. The former is also sometimes called the office-column or office-block

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<sup>41</sup> *Winn v. Blackman*, 229 Ill. 198; *Tandy v. Lanery*, 194 Ill. 372.

Specimen of Office-Column Form of Ballot. The form is divided into several sections for different offices and positions, including COX and ROOSEVELT, COX and GILLILAND, DESS and STEINMAN, and various representatives in the General Court. Each section includes a list of candidates and a column for the voter's choice, marked with an 'X'. Instructions at the top and bottom explain how to use the ballot, including the requirement to mark a cross in the square next to the name of the person to be elected.

SPECIMEN OF OFFICE-COLUMN FORM OF BALLOT

# SPECIMEN WOMEN'S BALLOT for

## ○ REPUBLICAN

For President of the United States  
**CHARLES E. HUGHES**  
 of New York

For Vice President of the United States  
**CHARLES W. FAIRBANKS**  
 of Idaho

FOR ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

- ☐ JOHN R. THOMPSON  
 1111 Grand Blvd. Chicago
- ☐ A. SHELDON CLARK  
 811 N. Oak St. Chicago
- ☐ I. LEWIS H. MINER  
 1111 N. Oak St. Chicago
- ☐ GEORGE E. MARTIN  
 1111 N. Oak St. Chicago
- ☐ DONALD S. McWILLIAMS  
 4111 Lake Park Ave. Chicago
- ☐ JAMES C. GARNER  
 1111 East Ave. Chicago
- ☐ JEFFERSON HODGKINS  
 1111 Franklin Ave. Chicago
- ☐ MAX WILSCHKE  
 1111 N. Oak St. Chicago
- ☐ SAMUEL B. PANAMA  
 1111 N. Franklin Ave. Chicago
- ☐ GEORGE L. ROBERTSON  
 1111 N. Jackson Blvd. Chicago
- ☐ GUS G. MARTIN  
 1111 Lake Blvd. Chicago
- ☐ WILLIAM C. CHUMMAN  
 1111 N. Michigan Ave. Chicago
- ☐ WILLIAM B. AUSTIN  
 1111 Michigan Pl. Chicago
- ☐ HENRY SEVERIN  
 1111 N. Jackson Blvd. Chicago
- ☐ JOHN LAMBERT  
 1111 Michigan Pl. Chicago
- ☐ SAMUEL D. HOLDERMAN  
 1111 Michigan Pl. Chicago
- ☐ WILLIAM T. RAWLEIGH  
 1111 Michigan Pl. Chicago
- ☐ HENRY TERRILL  
 1111 Michigan Pl. Chicago
- ☐ BEN ELMER DAY  
 1111 N. Oak St. Chicago
- ☐ ELBRIDGE L. BUGHANAN  
 1111 N. Oak St. Chicago
- ☐ JOHN W. ROGERS  
 1111 N. Oak St. Chicago
- ☐ HENRY F. RUEL  
 1111 N. Oak St. Chicago
- ☐ BEN P. ALLEN  
 1111 N. Oak St. Chicago
- ☐ ELMER C. CALDWELL  
 1111 N. Oak St. Chicago
- ☐ HOMER A. SEYMOUR  
 1111 N. Oak St. Chicago
- ☐ AMOS P. SPENCER  
 1111 N. Oak St. Chicago
- ☐ PHILIP W. BARNES  
 1111 N. Oak St. Chicago
- ☐ ANDREW J. POORMAN  
 1111 N. Oak St. Chicago
- ☐ CHARLES E. PEIRICH  
 1111 N. Oak St. Chicago
- FOR TRUSTEES OF THE UNIVERSITY OF ILLINOIS
- ☐ MARY BUSEY  
 1111 N. Oak St. Chicago
- ☐ WILLIAM L. ABBOTT  
 1111 N. Oak St. Chicago
- ☐ D. T. S. HOIT  
 1111 N. Oak St. Chicago
- FOR MEMBER OF STATE BOARD OF EQUALIZATION, 19th DISTRICT
- ☐ FRANK A. WHARTON  
 1111 N. Oak St. Chicago
- FOR COUNTY SURV.-YOR
- ☐ R. F. FISHER  
 1111 N. Oak St. Chicago

## ○ DEMOCRATIC

For President of the United States  
**WOODROW WILSON**  
 of New Jersey

For Vice President of the United States  
**THOMAS R. MARSHALL**  
 of Indiana

FOR ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

- ☐ CATHERINE WAUGH McCULLOUGH  
 1111 N. Oak St. Chicago
- ☐ REED GREEN  
 1111 N. Oak St. Chicago
- ☐ FRED SCHERER  
 1111 N. Oak St. Chicago
- ☐ HENRY HUMMERT  
 1111 N. Oak St. Chicago
- ☐ GEORGE J. MILLER  
 1111 N. Oak St. Chicago
- ☐ THOS. W. PETERS  
 1111 N. Oak St. Chicago
- ☐ GHAS S. THDRNTON  
 1111 N. Oak St. Chicago
- ☐ WM. P. BAUMANN  
 1111 N. Oak St. Chicago
- ☐ LEO L. MRAZEK  
 1111 N. Oak St. Chicago
- ☐ GHAS J. MAGEE  
 1111 N. Oak St. Chicago
- ☐ WILBUR K. GHAMPLIN  
 1111 N. Oak St. Chicago
- ☐ EUGENE C. O'RIELLY  
 1111 N. Oak St. Chicago
- ☐ STUART G. SHEPHERD  
 1111 N. Oak St. Chicago
- ☐ ROBERT E. BERLET  
 1111 N. Oak St. Chicago
- ☐ JOSEPH KREEGER  
 1111 N. Oak St. Chicago
- ☐ CHARLES FLYNN  
 1111 N. Oak St. Chicago
- ☐ WILLIAM L. BOEKE  
 1111 N. Oak St. Chicago
- ☐ THOMAS A. PENDER  
 1111 N. Oak St. Chicago
- ☐ HERSHEL V. JOHNSON  
 1111 N. Oak St. Chicago
- ☐ HENRY M. PINDELL  
 1111 N. Oak St. Chicago
- ☐ THOMAS KENNEDY  
 1111 N. Oak St. Chicago
- ☐ JAMES W. GRAHAM  
 1111 N. Oak St. Chicago
- ☐ DELBERT R. ENDCHB  
 1111 N. Oak St. Chicago
- ☐ FRANK ORR  
 1111 N. Oak St. Chicago
- ☐ J. STEWART CLARKE  
 1111 N. Oak St. Chicago
- ☐ MAURICE V. JOYCE  
 1111 N. Oak St. Chicago
- ☐ A. J. WORMAN  
 1111 N. Oak St. Chicago
- ☐ GEORGE C. STEPHENS  
 1111 N. Oak St. Chicago
- ☐ WALTER W. WILLIAMS  
 1111 N. Oak St. Chicago
- ☐ EDWARD GHILTON GRAIG  
 1111 N. Oak St. Chicago
- ☐ GEORGET PAOE  
 1111 N. Oak St. Chicago
- ☐ MRS. HANNAH G. SOLDMON  
 1111 N. Oak St. Chicago
- ☐ RICE J. MOORE  
 1111 N. Oak St. Chicago
- ☐ E. V. BURTON  
 1111 N. Oak St. Chicago

## ○ SOCIALIST

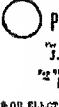

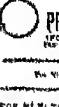
For President of the United States  
**ALLAN L. BENSON**  
 of New York

For Vice President of the United States  
**GEORGE R. KIRKPATRICK**  
 of New York

FOR ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

- ☐ S. H. ZIMMERMAN  
 1111 N. Oak St. Chicago
- ☐ E. H. TAYLOR  
 1111 N. Oak St. Chicago
- ☐ DUNCAN McDDONALD  
 1111 N. Oak St. Chicago
- ☐ FRANK SHIFFLESMITH  
 1111 N. Oak St. Chicago
- ☐ JOS. DE BARBERI  
 1111 N. Oak St. Chicago
- ☐ MILTON E. SHAVER  
 1111 N. Oak St. Chicago
- ☐ KELLAM FOSTER  
 1111 N. Oak St. Chicago
- ☐ FRANK KALINA  
 1111 N. Oak St. Chicago
- ☐ JAMES PROCHAZKA  
 1111 N. Oak St. Chicago
- ☐ MORRIS SEKIND  
 1111 N. Oak St. Chicago
- ☐ JOS. L. NAYLOR  
 1111 N. Oak St. Chicago
- ☐ DR. MOSES SAHOD  
 1111 N. Oak St. Chicago
- ☐ CHAS. KISSLING  
 1111 N. Oak St. Chicago
- ☐ JOHN WEYER  
 1111 N. Oak St. Chicago
- ☐ CARL F. SCHULTZ  
 1111 N. Oak St. Chicago
- ☐ OSCAR OOREN  
 1111 N. Oak St. Chicago
- ☐ LOUIS LING  
 1111 N. Oak St. Chicago
- ☐ J. G. GIBSON  
 1111 N. Oak St. Chicago
- ☐ R. S. SNIDER  
 1111 N. Oak St. Chicago
- ☐ JAS. RILEY  
 1111 N. Oak St. Chicago
- ☐ GUS SANDBORG  
 1111 N. Oak St. Chicago
- ☐ C. B. ADAMS  
 1111 N. Oak St. Chicago
- ☐ WM. BRYAN  
 1111 N. Oak St. Chicago
- ☐ GEO. SMITH  
 1111 N. Oak St. Chicago
- ☐ GUSTAV HILLER  
 1111 N. Oak St. Chicago
- ☐ T. H. WHITEHEAD  
 1111 N. Oak St. Chicago
- ☐ JOE. GLOBIG  
 1111 N. Oak St. Chicago
- ☐ J. M. VARNER  
 1111 N. Oak St. Chicago
- ☐ W. E. DAVIS  
 1111 N. Oak St. Chicago
- FOR TRUSTEES OF THE UNIVERSITY OF ILLINOIS
- ☐ ANNABELLE KENNEDY  
 1111 N. Oak St. Chicago
- ☐ MARY O'REILLY  
 1111 N. Oak St. Chicago
- ☐ ELLEN GATES STARR  
 1111 N. Oak St. Chicago
- FOR MEMBER OF STATE BOARD OF EQUALIZATION, 19th DISTRICT
- ☐ A. W. GREEK  
 1111 N. Oak St. Chicago
- FOR COUNTY SURVEYORS
- ☐

**an Election to be held November 7, 1916**

<div> <div>  </div> <div> <b>PROHIBITION</b>          For President of the United States  <b>J. FRANK HANLY</b>          For Vice President of the United States  <b>IRA LANDRITH</b>          Of Tennessee       </div> </div>		<div> <div>  </div> <div> <b>SOCIAL LABOR</b>          For President of the United States  <b>ARTHUR ELAHER REIMER</b>          Of Massachusetts          Vice President of the United States  <b>CALEB HARRISON</b>          Of Tennessee       </div> </div>		<div> <div>  </div> <div> <b>PROGRESSIVE</b>          For Social Justice          For President of the United States          Vice President of the United States       </div> </div>	
<b>FOR ELECTIONS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES</b>		<b>FOR ELECTIONS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES</b>		<b>FOR ELECTIONS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES</b>	
<input type="checkbox"/>	ELLEN M. ORR Harrisburg	<input type="checkbox"/>	THOMAS H. GRABOVSKY 110 Liberty St. York	<input type="checkbox"/>	
<input type="checkbox"/>	MARY SMITH Harrisburg	<input type="checkbox"/>	FRITZ LIGHTSINN The Anson Bk. Family	<input type="checkbox"/>	
<input type="checkbox"/>	MARY A. DEAN 107 Oakton St. Chicago	<input type="checkbox"/>	ANTON PICL 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	MARY E. METZGAR 107 Oakton St. Chicago	<input type="checkbox"/>	GEORGESCHLAG 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	ROBERT F. MILX 107 Oakton St. Chicago	<input type="checkbox"/>	HARRY BLOESMA 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	EDWARD T. LEE 107 Oakton St. Chicago	<input type="checkbox"/>	JOHN L. LINDSEY 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	C. C. KINDRED 107 Oakton St. Chicago	<input type="checkbox"/>	THOMAS GEMMEL 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	DAVID J. STEWART 107 Oakton St. Chicago	<input type="checkbox"/>	NAVY E. SHARP 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	A. H. LEAMAN 107 Oakton St. Chicago	<input type="checkbox"/>	JOSEPH HAMRLE 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	EDWARD E. BLAKE 107 Oakton St. Chicago	<input type="checkbox"/>	GEORGE BECOURS 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	JOHN A. WADHAM 107 Oakton St. Chicago	<input type="checkbox"/>	ENGELBERT ADAMEK 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	EDWARD HORTH 107 Oakton St. Chicago	<input type="checkbox"/>	RAGNVOLD FRITZVOLD 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	JOHN H. HILL 107 Oakton St. Chicago	<input type="checkbox"/>	JOSEPH GODDESS 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	CHARLES R. JONES 107 Oakton St. Chicago	<input type="checkbox"/>	CARL IVERSON 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	LYMAN S. BACKUS 107 Oakton St. Chicago	<input type="checkbox"/>	MICHAEL LINDNER 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	GEORGE E. CLARKE 107 Oakton St. Chicago	<input type="checkbox"/>	JOHN LINDQUIST 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	W. E. KENNEDY 107 Oakton St. Chicago	<input type="checkbox"/>	VINCENT MALIK 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	HUGH T. SPARKS 107 Oakton St. Chicago	<input type="checkbox"/>	ARVID NELSON 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	JOHN McCLELLAND 107 Oakton St. Chicago	<input type="checkbox"/>	JOHN ORTH 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	SAMUEL J. WHITE 107 Oakton St. Chicago	<input type="checkbox"/>	GEORGE BEINLICH 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	W. W. HOUSER 107 Oakton St. Chicago	<input type="checkbox"/>	JACOB ROTH 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	CAIUS C. GRIFFITH 107 Oakton St. Chicago	<input type="checkbox"/>	LOUIS SCHENKER 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	ADDISON D. BRIDGMAN 107 Oakton St. Chicago	<input type="checkbox"/>	THEODOR WAHLBERG 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	DAVID L. DARE 107 Oakton St. Chicago	<input type="checkbox"/>	JAMES TRAINOR 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	JAMES S. FELTER 107 Oakton St. Chicago	<input type="checkbox"/>	LOUIS WINCHESTER 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	WILLIAM S. HOFFMAN 107 Oakton St. Chicago	<input type="checkbox"/>	ADOLFS CARM 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	W. R. BONHAM 107 Oakton St. Chicago	<input type="checkbox"/>	JOSEPH STISKA 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	W. A. MORGAN 107 Oakton St. Chicago	<input type="checkbox"/>	AXEL YOUNG 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	A. J. DOUGHERTY 107 Oakton St. Chicago	<input type="checkbox"/>		<input type="checkbox"/>	
<b>FOR TRUSTEES OF THE UNIVERSITY OF ILLINOIS</b>		<b>FOR TRUSTEES OF THE UNIVERSITY OF ILLINOIS</b>		<b>FOR TRUSTEES OF THE UNIVERSITY OF ILLINOIS</b>	
<input type="checkbox"/>	MATTIE G. SQUIRES 107 Oakton St. Chicago	<input type="checkbox"/>	MRS. ANNA MILLER 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	SARAH S. SHEEN 107 Oakton St. Chicago	<input type="checkbox"/>	MRS. HANNA IVERSON 107 Oakton St. Chicago	<input type="checkbox"/>	
<input type="checkbox"/>	LUCIEBA E. MINOR 107 Oakton St. Chicago	<input type="checkbox"/>	E. T. HOLMES 107 Oakton St. Chicago	<input type="checkbox"/>	
<b>FOR MEMBER OF STATE BOARD OF EQUALIZATION, 13th DISTRICT</b>		<b>FOR MEMBER OF STATE BOARD OF EQUALIZATION, 13th DISTRICT</b>		<b>FOR MEMBER OF STATE BOARD OF EQUALIZATION, 13th DISTRICT</b>	
<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	W. H. WHARTON
<b>FOR COUNTY SURVEYOR</b>		<b>FOR COUNTY SURV' OR</b>		<b>FOR COUNTY SURVEYOR</b>	
<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	

form, since in this type the various candidates are arranged in columns according to the offices for which they are running. For the guidance of voters, however, party designations are printed after the name of each candidate. In voting this ballot, the voter must put a cross mark in front of the name of each candidate for whom he wishes to vote. This form of ballot facilitates independent voting, since it is as easy to vote a split ticket as it is to vote a straight party ticket. The need for reading the party designations may also operate as a slight educational test. The Indiana form of ballot is also sometimes known as the party-column form, since the names of the candidates of each party for all offices are grouped in separate columns. At the top of each party column is the party appellation and circle and also in some states the party emblem. This form of ballot is more commonly found than the Massachusetts form but is less desirable because it tends to facilitate straight party voting. By placing the cross mark in the circle at the top of the party column, the voter may vote for all of the candidates of the party for the various offices, thus avoiding the trouble and expenditure of time which would be involved in placing a cross in front of the name of each candidate for whom he wishes to vote. It is necessary for him to take this time and trouble, however, if he wishes to scratch his ticket, or to exercise independent judgment in voting and not to cast his vote for candidates merely because they bear a certain party label. In many cases, however, the voter has no other criterion for judging a candidate except the party label.<sup>42</sup>

Little is done by governmental action positively to assist the voter to cast an intelligent ballot. In a few states, however, publicity pamphlets are issued before the election describing the candidates and stating the arguments for and against the propositions submitted. In a few states the residence of the candidates is printed after their names on the ballot. Other information about them might with some advantage be printed on the ballot, but thus far this has not been done. It has been

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<sup>42</sup> The nonpartisan ballot, as used in general elections in Florida and in primary elections in a number of states, deprives the voter of even this slight guide.

a frequent practice to print the names of all candidates for national, state, and local offices and all propositions to be voted on at the same election on a single large sheet. In view of the great number of elective officers, especially in cities, this practice naturally makes the ballot very long and unwieldy. In a number of states, however, the practice has been adopted of printing propositions on separate ballots. By drawing the attention of the voter to such propositions, the separate ballot has the effect of considerably increasing the number of votes directly cast upon them. A few states also provide separate ballots for national offices from those for state and local offices. In a number of states the use of voting machines has been legalized, but, in spite of the advantages which they have over printed ballots, they have not yet come into general use.

#### REFERENCES

For references, see end of next chapter.

## CHAPTER V

### NEWER INSTITUTIONS OF DEMOCRACY

WITHIN recent years a number of political innovations, known as "newer institutional forms of democracy," have been advocated or introduced in state and local governments with the general purpose and design of promoting larger and more direct popular control over those governments. Among these newer devices are the direct primary election, the short ballot, the initiative, the referendum, and the recall.

#### The Direct Primary Election

In order to remedy the defects of the convention method of nominating candidates, two possibilities presented themselves. In the first place, the convention itself might be reformed and subjected to stricter regulation; in the second place, some other method of nomination might be substituted for the convention. If the convention had been subjected to adequate regulation at a sufficiently early date, it might perhaps have been retained. The placing of legal safeguards around the holding of the indirect primary or caucus, the abolition of all intermediate conventions, the legal regulation of the procedure in conventions in the interest of publicity, and other similar reforms might have made the convention a reasonably satisfactory agency for nominating candidates. But before such reforms could be instituted the dissatisfaction with the convention had become so deep and widespread that the people in many states were in no mood for halfway measures. Consequently, the second of the alternatives mentioned above has generally been adopted, and, after the beginning of the twentieth century the direct primary election has been introduced in state after state in place of the convention as the method of nominating candidates, until at present it is found in some form in all but two or three states.

The various state laws embodying this new form of nomination vary considerably from state to state and even in the same

state from time to time. Early direct primary laws were usually local and optional; afterwards in the large majority of states they became state-wide and mandatory. The optional primary is still found, however, in about a half dozen states, mostly in the South. These are essentially one-party states, the result of the Democratic or "white" primary being almost invariably equivalent to election. In the states having the mandatory primary, its various features are regulated by law in great detail. The date for holding the primary election is specified by law, and the primaries of all parties to which the law applies are held on the same date and at the same place. The usual safeguards and methods of procedure in force at general elections are applied to primary elections. The judges and clerks at general elections usually occupy the same offices at primary elections. There are, as a rule, the same legal provisions regarding ballot boxes, challengers, electioneering and bearing the expense of the election. There is generally a separate ballot for each party, and the ballots are usually uniform in size and shape but sometimes differ in color.

The scope of direct primary laws varies from state to state. They do not, as a rule, apply to all parties but only to the larger ones. In order to secure recognition on the primary ballot, and in order to come within the restrictions of the primary law, an association of voters must comply with the definition of a political party as contained in such law. This definition takes the form of a requirement that the party must have polled a certain number of votes at the last preceding general election or a certain percentage of the total votes cast, varying from one to twenty-five per cent. Minor parties which do not come within this definition, however, may usually make their nominations by petition and secure the printing of the names of their nominees on the ballot at the regular or general election. The officers to whose nomination the primary law applies are specified in the law, and usually include local and state officers as well as Presidential electors and members of Congress. Not infrequently, however, a number of elective officers are not nominated at the primaries. In some states the legal requirement as to nomination at the primaries applies only to local officers. But in the



majority of the states that have adopted the direct primary, the law applies to the nomination of all state-wide elective officers. Not only are public officers nominated at the primaries, but party officers such as members of the state central and other party committees and delegates to nominating conventions are frequently chosen at the primaries. The length of the primary ballot, therefore, varies considerably: in some states being very long and in others comparatively short.

In order to have his name printed upon the primary ballot, an aspirant for the nomination to a public office is required to file with the proper officer a petition containing a specified number or percentage of signatures.<sup>1</sup> The number of signatures required is usually greater in the case of important officers chosen by state-wide election than in the case of local or less important officers. The petitions must be filed in the office of the secretary of state, the county clerk, or the city clerk (depending on the character of the office for which the nomination is sought), not more nor less than a certain number of days prior to the date of the primary election. Signers of petitions must be qualified voters and the law contemplates that the officers with whom the petitions are filed shall satisfy themselves as to the genuineness of the signatures. This function, however, is not always efficiently performed and fraudulent practices in connection with the preparation of petitions are not unknown.

The names of candidates for nomination for each office are sometimes printed on the primary ballot in the order in which their petitions for nomination are filed. This plan frequently led to disgraceful scrambles among the candidates or their representatives in order to secure the advantages deemed to arise from first place on the ballot. A better plan, frequently followed, is to provide for alphabetical arrangement with rotation of names on different sets of ballots. But the mere fact that first place on the ballot is of such decided advantage to a candidate would seem to indicate that the candidates are too numerous or the offices too unimportant for the voters to make an intelligent choice.

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<sup>1</sup> Occasionally, the filing of a mere declaration of candidacy is sufficient.

The large majority of states follow the plan of requiring merely a plurality of the votes cast for the office sought in order to nominate. Under this plan, even when an unusually large vote is cast at the primary, a candidate may be nominated by a minority of the voters, and if many candidates are contending for nomination for the same office, a candidate may be nominated by a very small percentage of the voters. In order to prevent nominations from being made by such small minorities, some states provide that a candidate, in order to be nominated, must receive not only a plurality, but also a certain fixed percentage of the vote cast for the office sought, and that, if no candidate receives such a percentage, the power of making the nomination reverts to the convention.<sup>2</sup> A few Southern states require a majority of the vote cast for the office in order to nominate, and, if no candidate receives a majority, a second or "run-off" primary election is held as between the highest two candidates in the first primary. In order to avoid the expense of holding a second primary, however, Florida has adopted the preferential plan of voting, whereby the voter indicates both his first and second choices and, if no candidate has a majority of first choice votes, second choice votes are added and the highest vote then nominates.

The same qualifications are usually required of voters at primary elections as at general or final elections. Thus, in addition to the requirements as to age, residence, and citizenship, registration is also required in many states. There is, moreover, a further qualification required for participation in the primary election which does not apply to the final election, *viz.*, that the would-be voter in the primary election must be affiliated with the party in whose primary he desires to participate. This requirement is found in all but one or two of the states having direct primary laws, and is known as the "closed" primary. It

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<sup>2</sup> This plan has been adopted in Iowa, where 35 per cent of the vote cast in the primary is required to nominate. If the nomination is thrown into the convention, that body is not confined to the contestants in the primary, but in practice nominates from among such contestants, though not necessarily choosing the "high man." F. E. Horack, "The Workings of the Direct Primary in Iowa," *Annals of the American Academy of Political and Social Science*, March, 1923, p. 154.

involves the necessity of formulating some test of party affiliation. This usually consists of a personal declaration by the voter at the time of the primary, or at the time of registration previous to the primary, that he is affiliated with the party in whose primary he desires to vote.<sup>3</sup> The declaration may also be required to cover past affiliation or future intention. Usually a voter in the primary election is prohibited from making any change in his party affiliation for a certain length of time before the primary, varying from ten days to two years. If a voter is not affiliated with any party or does not wish to disclose his party affiliation, he cannot participate in the primary of any party. This, however, does not prevent him from participating in the general election nor in a nonpartisan primary, if any such primary should be held in his voting district. The test of party affiliation is sometimes defined and administered by the political party itself, but in the large majority of states the tendency is decidedly in the direction of legal definition and official administration.<sup>4</sup>

Although the tendency is in the direction of the "closed" primary, described above, the "open" primary is still found in one or two states. In this form, no test of party affiliation is required, and any qualified voter may participate in the primary without regard to his party affiliation or lack of affiliation with any party. Upon appearing at the polls he is handed the ballots of all parties, and votes the one of his choice, discarding the others. Since the ballots are uniform in external appearance, there is no disclosure as to the party in whose primary he participates.

### The Working of the Direct Primary

The movement for the direct primary paralleled that for the initiative and referendum. Both resulted from lack of popular confidence in a supposedly representative institution: the

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<sup>3</sup> In order to vote in the party primary in South Dakota, the voter must either in person or by mail notify the county auditor of his party affiliation at least fifteen days before the date of the primary election.

<sup>4</sup> M. McClintock, "Party Affiliation Tests in Primary Election Laws," *American Political Science Review*, August, 1922, pp. 465-467.

delegate convention in the former case, and, in the latter, the legislature. Both were intended to transfer power directly into the hands of the people. Neither has worked in practice altogether in accordance with the expectations of friends or enemies.

The closed form of primary, which, as stated above, is found in the great majority of states, is likely to prove discouraging to the independent voter who does not wish to affiliate with any party, while at the same time exercising some influence on the nominations. It also tends to discourage the easy shifting and regrouping of voters in accordance with changing issues. The test of party affiliation as found in the laws of some states is unduly restrictive, and makes for the sharp drawing of party lines and for a party solidarity that is likely to be to a considerable extent unreal and artificial. The closed primary is naturally favored by the party organization of the majority party and is also supported by many competent observers on the ground that it tends to prevent the voters of one party from conspiring to secure the nomination of undesirable candidates for another party.<sup>5</sup> It is undoubtedly true that many voters who ordinarily voted for the candidates of the minority party in the general election, when there were no contests of importance in their own party primary, frequently switched over and participated in the primaries of the majority party. Although in the great majority of states the primaries are legally and technically "closed," still, in many instances, especially in Western or Northwestern states, they are practically to a considerable extent or altogether "open," since the requirement of a mere declaration of present affiliation or future intention furnishes little or no protection against the inroads of voters from other parties. If such outside voters should participate in a decisive manner in the primaries of the majority party, the organization of that party could not justly be held altogether responsible for the results. It is a mistake, however, to assume that in all cases when a member of one party participates in the primary of

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<sup>5</sup> See Charles E. Hughes, "The Fate of the Direct Primary," *National Municipal Review*, January, 1921, p. 26.

another, he does so in order to secure the nomination of the weakest or least desirable candidate of that party. It seems but fair to assume that in many cases he is endeavoring to make his vote count in securing the nomination of the best candidate in the party whose nomination is likely to be practically equivalent to election.

It is of interest in this connection to note the effect, if any, which the operation of the direct primary has had upon the party organization. Although at the outset it was predicted by many prophets, both major and minor, that the direct primary would wreck the party organization, this has not been the result, nor would such a result be altogether desirable. In spite of the primaries, party organizations continue a vigorous life and they still influence or even control nominations to a large extent, although probably not quite to the same extent that they did under the delegate-convention system. The practice of slate-making has not been eliminated and the organization's slate of candidates usually wins, although probably not so frequently as under the convention system, for now the slates must be made up before the primary election and the voters have the opportunity of eliminating the organization candidates if they are especially bad. This very fact places more pressure upon the organization leaders to put forward good men than was exerted upon them under the convention system. The extent of the organization's control over nominations naturally varies from time to time, depending upon the state of public opinion among the rank and file of the party, whether apathetic or aroused, and upon the extent of the feeling of revolt against machine domination. Experience in most states indicates that in ordinary times the practically complete control of the organization over nominations is not seriously threatened or interfered with, but that, upon occasion, the mass of the voters of the party may rise up in their wrath, smite the machine slate, hip and thigh, and nominate candidates who were not only not endorsed by the organization but who may even be its bitter enemies. The possibility that such a thing may happen is naturally calculated to inject into the organization a degree of moderation in making slates and a solicitude for the susceptibilities of the rank and

file of the voters that it could hardly have been expected to entertain under the delegate-convention system.

The introduction of the direct primary has by no means had the effect in all states of abolishing the delegate-convention, although it has been shorn of some of its former prestige and influence. It is still retained in many states for the purpose of nominating such candidates as the law does not require shall be nominated by direct primary election and for the purpose of drawing up the party platform of principles.<sup>6</sup> The practice of the organization in drawing up slates in party conferences or conclaves has developed unofficially and to some extent covertly in many states. A few states, however, have now accorded legal recognition to this practice through the provision in the law for the holding of pre-primary conventions. Such conventions cannot nominate candidates but may designate a list of candidates to be presented to the voters at the primary, whose names go on the ballot with those of other candidates. This plan is designed to place the organization under official responsibility for the candidates it supports and seems to be a desirable arrangement provided no advantage is afforded by the law to the convention's candidates over others nominated independently. The choice between the organization's candidates and the independents is then presented squarely to the voters.<sup>7</sup>

It is not necessary to hold pre-primary conventions in order to provide for party designees, since this function might be performed by the party committee. Some method of designation is likely to be followed in any event, and it would seem to be better to recognize this situation in the law so that the pro-

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<sup>6</sup> In some states, however, the function of formulating the party platform has been consigned to the state committee, or, in Wisconsin, to the candidates for state office acting with the hold-over members of the legislature, or, in South Dakota, under the Richards law, to specially elected "proposal men." Merriam, *The American Party System*, pp. 236, 267.

<sup>7</sup> S. C. Wallace, "Pre-Primary Conventions," *Annals of the American Academy*, March, 1923, p. 97. A novel variation of the pre-primary proposal convention is found in South Dakota, where the majority and the minority in the convention may each propose a separate slate of candidates, whose names are printed in parallel columns on the primary ballot. C. A. Berdahl, "The Operation of the Richards Primary," *ibid.*, p. 161.

ceedings may be rendered more open and regular. Such official designation is doubtless a departure from the strict theory of the direct primary, and may be considered to represent a reaction from its pure form. But it is more in harmony with the facts of party activities.

One effect of the introduction of the direct primary in some states was greatly to increase the number of aspirants for public office. Thus, in 1912 more than one thousand petitions of candidates for place on the primary ballot were received in the office of the secretary of state of Illinois by mail and messenger. Four years later and again in 1924 the number had increased to between twelve and fifteen hundred. A reduction in the number of petitions might be effected by increasing the percentage of voters required to put a name on the primary ballot, but if the percentage were too great undue weight might be given to the use of money in securing signatures. Since the novelty of the direct primary method of nomination has worn off, however, the number of petitions filed has tended to decrease. In some states, moreover, the number of candidates has never been large, and there have been relatively few contests in the primaries. This has doubtless been due in many cases to the feeling that the organization slate had so great an advantage that a fight against it would be hopeless. Except where provision for minority representation is made, as in the case of the lower house of the Illinois legislature, there are also relatively few contests in the primaries of the minority parties in essentially one-party states, since few candidates are attracted by the opportunity of leading a forlorn hope.

Probably another cause for the paucity of candidates for state-wide office in some states is the expense involved in securing office under the direct primary system. Direct primaries tend to increase not only the public expense in holding elections, but also the campaign expenses of the candidate for an important office, since he is under the necessity of endeavoring to reach the voters in two campaigns. This naturally gives an advantage to the candidate of the organization which has a "barrel" at its disposal, or to the wealthy candidate who is able to build up a personal organization. If a candidate does not

supply the funds out of his own pocket, he is put under obligation to others who supply them for him and who, in return, are likely to expect official favors from him in the event of his election.

The financial burden imposed by the direct primary upon the candidates and upon the public has given rise to considerable criticism. It should be remembered, however, that the use of money in rounding up delegates was not unknown under the convention system. Moreover, even if it were admitted that more money is spent under the direct primary system, this would not necessarily be a conclusive argument against it, since the greater degree of popular control over the selection of candidates under the latter system might be well worth the additional cost. Furthermore, some check against the use of money is afforded by the fact that too lavish an expenditure made on behalf of a candidate in the primary may react against him and lose for him more votes than it gains.<sup>8</sup>

The number of voters who participate in direct primaries has been disappointing to the advocates of that system. Unless some unusual situation arises, many voters maintain an apathetic state of mind toward the primaries. The variation in the vote polled at the primaries is rather wide, ranging from about 25 to about 85 per cent. On the average the percentage of voters who vote in the direct primary elections is decidedly larger than that of the voters who participated in the caucuses or indirect primaries under the old convention system. It may even be larger than the percentage of voters who vote in the general election in those cases where a nomination is practically equivalent to election. More frequently, however, the percentage of voters at the general election is greater than at the direct primary election.

Although the direct primary has shown various defects in operation, there is little doubt that, on the whole, it is superior to the delegate-convention system as that system actually operated. It is necessary, under the direct primary system for the candidates for important offices to appeal directly to the rank

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<sup>8</sup> C. E. Merriam, "Recent Tendencies in Primary Election Systems," *National Municipal Review*, February, 1921, p. 90.



and file of the voters instead of merely to organization leaders and party managers who control delegates, as was the case under the convention method of nomination. Although this circumstance may militate somewhat against the solidarity of party organization, it seems to tend in the direction of more democratic control over the forces which, in turn, control the government. In the case of the governor, the method of nomination by direct primary election tends to increase his prestige and influence as the leader of his party, provided that the rivalries and enmities which may have been engendered during the primary campaign are sufficiently healed after the election.

Although some of the defects of the direct primary are apparently inherent and largely unavoidable, others would seem to be remediable. It is obvious that the principle of the short ballot should be applied to primary elections as well as to general elections, and that the voters should be expected to nominate candidates for such offices only as are sufficiently important to attract general public attention. Direct primaries tend to complicate the system of elections and to increase their number, so that such a burden is placed upon the voter that in ordinary times he may fail to bear it except perfunctorily. This situation may leave the real control of nominations in the hands of irresponsible party machines. The more complicated the process of nomination, the more it requires the expert politician to operate it. The application of the short ballot would, however, to a large extent overcome this difficulty by enabling the voters to exercise greater control, although too much faith must not be placed in mere mechanical helps of this sort. If the short ballot is introduced in general elections the officers who remain on the elective list will naturally assume increased powers, and should therefore be subjected to greater and more direct popular control, and this may be brought about in part by the popular recall, as will be shown later, and in part through nomination in direct primaries. Such direct popular control through nominations in the primaries could, moreover, be materially increased by the introduction of the merit system in the selection of civil service employees. The activities of a numerous class of office-

holders, appointed under the spoils system, are naturally exerted in favor of organization candidates at the primary elections, and render popular control more difficult, especially where the long ballot prevails.

Some of the objections to the closed party primary might be avoided through the introduction of the nonpartisan primary, which has been adopted in some states in connection with judicial and local elections, and, in Minnesota, in the election of members of the legislature. Under this plan the names of candidates are usually placed alphabetically on the primary ballot as the result of the filing of petitions. No party designation or emblem appears upon the ballots. The names of the two candidates for each office who poll the highest vote in the primary are printed on the official ballots at the regular election. The advantages of this plan are, first, it tends to separate local or state from national politics; secondly, it makes it unnecessary for the state to formulate a legal test of party affiliation; and, finally, it embodies the principle of a majority rather than a plurality election. Even under the nonpartisan primary, however, the practice of slate-making may be indulged in by the party organizations and certain candidates openly endorsed or the word passed quietly around among the party followers to vote for a certain list of candidates, so that the influence of the party organizations is by no means altogether eliminated.

In fact, neither direct primary elections nor nonpartisan primaries have succeeded in greatly decreasing the activity and influence of party organizations. On the other hand, nonpartisan nomination and election tends to emphasize personalities rather than party principles, and it reduces party leadership and party responsibility for the results attained under the system. It is a more satisfactory system as applied to local than to state-wide elections, since, in the former, it is usually possible for the voter to have more information regarding the character and fitness of the candidates. In state-wide elections, especially where the long ballot prevails, the voter must depend upon the party label in the case of all but the more important candidates as his only guide in making a selection. This is not so much an

objection against nonpartisanship as it is against the long ballot.<sup>9</sup>

As will be seen from the above considerations, there is much to be said both for and against direct primary elections, and political scientists are not fully agreed as to the merits of this device. It is possible that the ultimate solution of the problem, as far as the nomination of legislative candidates, at least, is concerned, may be found in the adoption of some form of voting, such as proportional representation, whereby primary elections will be rendered unnecessary.<sup>10</sup>

### The Short Ballot

The large number of elections, both primary and regular, places a rapidly increasing burden of expense upon the taxpayers. To some extent the number and expense of elections is kept down by combining the election of national, state, and local officers in one election. But this practice has the disadvantage of confusing the issues which are necessarily different in these elections. Although nothing should be done still further to confuse the issues and the voters in elections, a reduction in the number and expense of elections is undoubtedly desirable and even imperative.

A committee of the Chicago City Club, in a report made in 1912, pointed out that the voter in Illinois is "called upon to make intelligently and conscientiously all the way from twenty-five to fifty-five separate decisions at the polls—to pass upon the qualifications of hundreds of men who aspire to many offices of diverse character." A ballot used in Chicago at the general election of November, 1916, was three feet long and twenty inches wide and contained about 270 names arranged in six party columns. In addition, the voter was expected to vote

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<sup>9</sup> R. E. Cushman, "Nonpartisan Nominations and Elections," *Annals of the American Academy of Political and Social Science*, March, 1923, pp. 83-96.

<sup>10</sup> For various points of view regarding the direct primary, see "A Model Election System, and the Direct Primary: Pro and Con," *National Municipal Review*, December, 1921; and R. S. Boots, "The Trend of the Direct Primary," *American Political Science Review*, August, 1922, pp. 412-431.

the separate ballot for judges of the municipal court, containing the names of more than thirty candidates, and another so-called "little ballot," two feet long, containing five propositions—two city bond issues, park consolidation, banking law amendment, and tax amendment to the constitution. During the year 1916 the voters of Chicago were expected to choose or to assist in choosing more than three hundred different elective officials. To inform himself adequately regarding the merits and qualifications of the multitude of candidates is a task which the ordinary busy citizen is unable to perform without assistance. The excessive number of elections and of elective officers is undoubtedly a serious danger, and, in the minds of competent observers is tending to defeat the very purpose of democracy.<sup>11</sup>

The buoyant expectations of the Jeffersonian and Jacksonian democracy have undoubtedly received a severe disillusionment. We have begun to realize that the introduction of supposedly democratic devices, such as wide extension of the suffrage, frequent elections and numerous elective officers, has given us merely the shell and husk of democracy and not the substance. In particular, it is seen that frequent elections and numerous elective officers are formulas which, however applicable they may have been at a time when the nation was homogeneous and largely rural in character, have now outlived their usefulness, and must be relegated to the scrap pile. These devices placed such a heavy burden upon the voter that he abdicated the function which he was supposed to perform and left the selection of a large proportion of the petty and unimportant officers to the party managers and political experts. The officers remained nominally elective by the people but were in reality appointed by the political experts who controlled the nomination of candidates. The conditions were such that the average voter could not perform the functions which the elective system required of him. His position was somewhat analogous to that of the "economic man" figured by the economists of the early part of

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<sup>11</sup> One means of shortening the ballot in the literal sense would be by removing the names of presidential electors, as has been done in Nebraska and Iowa. See G. C. Sikes, "A Step Toward the Short Ballot," *National Municipal Review*, September, 1922, pp. 260-262.

the last century, who was supposed always to act in accordance with his own economic interest, and his action would redound not only to his own interest but also to the interests of society as a whole. But in actual life this turned out not to be the case. Similarly, it was apparently supposed that the political man would exercise an intelligent choice in voting for the multitude of petty officials on the ballot. In practice, it is found that he does not do so, but in most cases contents himself with voting a straight party ticket and thereby transfers the real power of selection to the political experts who draw up the party slate.

The realization by many people of the fact that they do not really exercise any power of selection of many nominally elective officers has led directly to the movement for the short ballot. The principle of the short ballot, as formulated by the National Short Ballot Organization, is as follows: "First, only those offices should be elective which are important enough to attract and deserve public interest; and, secondly, very few offices should be filled by election at one time, so as to permit adequate and unconfused public examination of the candidates."<sup>12</sup>

If it be asked, what officers are important enough to arouse public interest, the answer is, only those few officers at the head of the ticket whose functions involve the determination of policy. Such officers are usually sufficiently conspicuous and their relative merits are before the public eye to such an extent that the people can choose intelligently between them. In connection with the management of their offices and the performance of their functions, there may be legitimate differences of opinion as to the proper policies to be pursued, which can be appreciated by the mass of the electorate. With respect, however, to the horde of minor offices and clerical positions, which involve the performance of merely ministerial duties, there can be no legitimate difference of opinion as to the proper method of attending to such duties, capable of being appreciated by the mass of the voters, and it is absurd, therefore, to submit the choice of such petty officers to the people at the polls. The principle involved may be summed up in the phrase: When you

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<sup>12</sup> Childs, *Short Ballot Principles*, Preface.

want representation, elect; when you want administration, appoint.

"The folly of obliging the people to decide at the polls upon the fitness for office of a great number of persons lies at the bottom of almost all the misgovernment from which we suffer, not only in the cities but in the states. It is a darling device of the political jobbers and a most successful one; for, under the hollow pretense that thus the people have the greater power, they are able to crush public spirit, to disgust decent and conscientious citizens with politics, to arrange their 'slates,' to mix the rascals judiciously with a few honest men whenever public sentiment imperatively demands that much, and to force their stacked cards upon the people."<sup>13</sup>

The second part of the short ballot principle, as stated above, might conceivably be carried out by retaining the existing number of elective officers, but increasing the length of their terms or increasing the frequency of elections. While an increase of the length of terms would, in many respects, prove a desirable feature in connection with the short ballot, an increase in the frequency of elections has little to recommend it. We already have too many elections, and, besides adding to the burden of public expense, a multiplication of elections would still further complicate our governmental machinery and reduce the relative amount of public interest that could be brought to bear at any given election.<sup>14</sup> It is a prime defect of the movement for nominations by direct primaries that it increases unduly the number and expense of elections. That device cannot be expected to attain the desired results unless combined with the principle of the short ballot.<sup>15</sup> There should be both a decrease in the number of elections and a reduction of the number of elective offices.

The short ballot is a device which aims in the direction of needed simplification of governmental machinery. The simpler

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<sup>13</sup> C. Nordhoff in *North American Review*, XCIII, p. 327, quoted by Beard, "The Ballot's Burden," *Political Science Quarterly*, XXIV, p. 609.

<sup>14</sup> See F. H. Garver, "Nine Elections in One Year," *American Political Science Review*, III, p. 433.

<sup>15</sup> Merriam, *Primary Elections*, p. 167.

any form of government is, the better will the people who live under it be able to understand it, and the better any people are able to understand their government, the greater control they will be able to exercise over it. Under the system of the long ballot, not only are the people unable to exercise an effective control over their government, but there is a lack of concentrated responsibility for the management of the public business, without which harmony and efficiency in administration are scarcely attainable. The short ballot not only tends to increase democratic control of government, but also tends to integrate the administration by reducing the possibilities of internal friction among the administrative personnel. It thus largely reconciles the sometimes apparently conflicting principles of democratic control of government and efficiency in administration. The short ballot is at the heart of the problem of reorganizing the state administration into a small number of homogeneous departments under responsible heads in the interest of economy and efficiency.

### The Recall

The recall is a device by which the people may remove an officer prior to the end of his ordinary term. A certain portion of an officer's term, usually six months, must ordinarily elapse before he is subject to recall. Upon the filing of a recall petition containing a sufficient number of signatures, usually 25 per cent of the voters, an election is held at which the question submitted is whether the incumbent of the office shall remain in office or be retired to private life. Usually, however, this is not the only question, since the names of other candidates in addition to that of the incumbent may be placed on the ballot. In that case the election turns not merely on the record of the incumbent but also on his relative popularity as compared with that of the other candidates.

The recall was first adopted in Los Angeles in 1903 and has since been introduced in a considerable number of cities. Removal of state officers through the popular recall was first provided for in Oregon in 1908 and has since been adopted in about a dozen, principally Western, states. It is usually made

applicable to all elective state officers.<sup>16</sup> Such officers cannot be held accountable by their administrative superiors, for the method of administrative removal in the states is seldom applied to elective officers. The introduction and growth of the recall, therefore, is a logical result of the practice of electing numerous state officers by popular vote. If frequently used, it would have the effect of increasing unduly the number and expense of elections, and would tend to interfere with the continuity of administration. The recall is aimed, however, at a real evil, *viz.*: lack of responsibility on the part of the many practically independent elective state officers; but, in most cases, it is the wrong method of attempting to remedy the evil. The proper method of reaching the difficulty is through subjecting such state officers to adequate control by administrative superiors. The recall should not be applied to officers not properly policy-determining, for the same reason that such officers should not be elective. In the case of the head of the state administration, since he is a policy-determining officer, and since there is no administrative superior by whom he can be held responsible, the method of removal through the recall might properly be applied to him, subject to reasonable restrictions. But the responsibility of all lesser administrative officers to the popular will should be insured indirectly through the control which the people would exercise by election and recall over the head of the administration, and through the power of the latter to appoint and remove his administrative subordinates.

The short ballot, therefore, combined with administrative removal would render the recall largely unnecessary, except as applied to the head of the administration. If the short ballot is extensively introduced in state administration, it will have the effect of increasing the power of the head of the administration, because the appointment of a number of officers hitherto elective will necessarily be placed in his hands. This increase of power would not be dangerous because it would be combined with increased responsibility. But, in order to guard against

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<sup>16</sup> Some states, however, except judges from the operation of the popular recall, while Kansas applies it to appointive as well as to elective officers.



the possibility of abuse of power, the recall might be made applicable to the head of the administration.

The recall has been but little used, the most conspicuous instance thus far being the recall of the governor of North Dakota in 1921.<sup>17</sup> This is probably due in part to the requirement of a petition containing the signatures of 25 per cent of the voters, which involves considerable expense. In the case of Illinois cities under the commission form of government, this requirement is as high as 55 per cent, which is naturally prohibitive.

The essential principle of the recall is that a public servant or agent may be dismissed by his principal, the people, whenever his services become unsatisfactory. This principle assumes, however, that the officer in question is an important policy-determining officer, and one, therefore, about the efficient performance of whose duties an effective public opinion can be aroused. Usually, the governor would be the only state officer fulfilling this requirement. As applied to him, the recall would naturally tend to make him more responsive to the popular will. The recall also tends to break down the astronomical aspect of the government, according to which officers can be changed only at the expiration of so many moons. The existence of the recall would permit the lengthening of official terms and granting increased powers without increased danger of abuse. On the other hand, the right of recall might be abused. Politicians in office might cater to passing popular whims rather than devote their attention to the efficient performance of humdrum duties. Politicians out of office might manipulate recall elections or hold recall petitions over the heads of faithful public officials. Moreover, if frequently used, the recall would place too great a burden upon the already overburdened voter.

### The Initiative and Referendum

The popular referendum and the initiative combined with the referendum are two of the most important of the so-called "newer institutional forms of democracy." The state-wide

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<sup>17</sup>D. H. Carroll, "The Recall in North Dakota," *National Municipal Review*, January, 1922, p. 3.

initiative and referendum as applied to ordinary legislation were first adopted in South Dakota in 1898 and are now found in various forms or to some extent in nearly half of the states. Disregarding certain variations, the referendum may be defined in general as a device whereby a certain percentage of the voters may require that an act of the legislature shall receive the approval of the electorate before becoming a law; while the initiative may be defined as a device whereby a certain percentage of the voters may draft a proposed law and secure its adoption upon ratification by popular vote.<sup>18</sup> The so-called initiative is thus in reality a combination of the initiative and the referendum. The initiative may, however, be either direct or indirect. In the former the process is carried through without the participation of the legislature at any stage. In the latter, the measure, after being initiated by the required percentage of the voters, is submitted to the legislature which may either pass it as a legislative act or may submit for popular approval a competing or alternative measure.<sup>19</sup>

The initiative in general is a positive right of the people, enabling them to secure needed legislation which the regular legislative body fails or refuses to pass; while the referendum is negative in character, enabling the people to prevent the enactment of measures which they deem unwise or inadvisable. The referendum may be either compulsory or optional. In the former, a reference to the people is essential before the measure can go into effect, while in the latter, the measure may go into effect without popular ratification unless the referendum is invoked by a popular petition. A special form of the referendum is that under which the legislature provides that a measure shall take effect in a given locality when ratified by the voters of that particular subdivision of the state. This is what is known as "local option" and seems on its face at least to be a violation of the principle that legislative authority cannot be

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<sup>18</sup> These two devices are usually found together, but may be and sometimes are found separately.

<sup>19</sup> Or the same measure, *i.e.*, as in South Dakota, where the legislature is required to submit the proposed measure, but, nevertheless, there must be this legislative action.

delegated, but it has grown up historically as an exception to this principle.

The compulsory referendum had been in use long before 1898 in connection with the adoption of new constitutions and constitutional amendments. In their distrust of the legislative assemblies, the framers of many state constitutions have also required popular referenda to validate certain acts of ordinary legislation, such as amending the banking laws or incurring a state debt of more than a given amount. Since constitutions contain many provisions which are essentially statutory matter, the people in adopting new constitutions or constitutional amendments are really passing on much ordinary legislation. The state-wide referendum on ordinary legislation, as introduced in South Dakota in 1898, therefore, is not radically new and constitutes no real break with precedent. In this respect it is less radical than the initiative.

The state-wide initiative and referendum on ordinary legislation have been introduced principally in Western states. In the few Eastern states in which they have been adopted, modifications have been introduced which reduce to some extent popular control over legislation and leave more discretion to the representative legislature. The comparatively slight extension of these devices in the Eastern states is doubtless due in part to their greater conservatism. Another condition which has worked against the adoption of the initiative and referendum in some states has been the contest between urban and rural districts for control of legislation. The under-representation of cities has given the advantage in the representative legislature to the rural districts. The introduction of the initiative and referendum, however, would tend to reverse this situation and give the advantage to the cities. This would result from the fact that it is easier to circulate petitions in closely populated areas and easier to get out a comparatively large percentage of the voters at the polls. In case of direct legislation, moreover, cities would be accorded full weight according to population. The rural districts have therefore opposed the introduction of the initiative and referendum as constituting a menace to their continued control over legislation, and have been able

to make their opposition effective through their control of the representative assembly.

A device which, although not a true initiative, represents an intermediate stage in the approach thereto, is found in Illinois in the form of a public policy law, enacted in 1901. Under this law, on a petition signed by twenty-five per cent of the voters of any political subdivision of the state or ten per cent of the voters of the whole state, it is the duty of the proper election officers in each case to submit any question of public policy so petitioned for to the voters of the subdivision or state respectively at any general or special election named in the petition. Not more than three propositions may be submitted at the same election. The petition must be filed not less than sixty days before the election. The purpose of the law is to make it possible to secure an expression of public opinion as a guide to the general assembly in the enactment of laws. It does not follow, however, that because public opinion, as thus expressed, favors the enactment of a particular law, such law will necessarily be passed by the general assembly. There is no legal compulsion resting upon it to do so, and no pledge taken by the members of the legislature to vote in favor of such a law, and, in practice, most of the propositions favored by public opinion as expressed under the public policy law, have not been enacted by the general assembly. It should be added, however, that several public policy votes related to proposed constitutional amendments, and consequently could not have been enacted into law by the legislature, although that body might have proposed them to the people.<sup>19a</sup>

In the case of the initiative and referendum, as introduced in South Dakota in 1898 and subsequently adopted in other states, the percentage of voters required to sign petitions varies from five per cent to ten per cent, although occasionally a definite number of petitioners is required. Securing the neces-

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<sup>19a</sup> Among the propositions which have received the approval of public opinion, as thus expressed, but which have not been enacted into law by the general assembly, are those for the popular initiative and referendum, a corrupt practices act, and a short ballot commission.

sary number of signatures to petitions seems in most cases to be mainly a matter of expense. Hence, petitions are more likely to be gotten up by organized elements in the states whose material interests are likely to be affected by proposed legislation than by groups of persons working for a mere vague general welfare. A class of professional "petition-pushers" has grown up in states having the initiative and referendum, who undertake to secure the necessary number of signatures on a petition at a few cents per signature. Many people sign petitions without consideration in order to get rid of the importunities of the petition-pusher. In some communities, however, the petition-pushers as a class have made themselves so obnoxious that many persons have adopted a rule of not signing any petitions. Although attempts are made to provide against fraudulent signatures, it seems difficult to make these restrictions sufficiently stringent without unduly hampering the getting up of petitions. It has been suggested that, instead of allowing petitions to circulate freely, it would be better to have a petition on file at some central place in each city or county, to which petitioners would have to go in order to attach their signatures under official supervision. This plan, however, would probably be unworkable in most cases unless the required number of signatures were reduced.

One objection that has been urged against the initiative and referendum is that they tend to break down the distinction between constitutional and statutory law. This tendency is emphasized by the fact that in some states the same procedure is provided for the initiation and adoption of constitutional amendments and of ordinary legislation. Since constitutions contain much statutory matter, however, this distinction is already tending to break down. Moreover, there is no great need for a sharp distinction between constitutions and statutes in the states, since fundamental rights are adequately protected by the Constitution of the United States.

On initiative and referendum measures, it seldom happens that more than seventy per cent of the electorate vote on the proposition, while the vote has sometimes dropped as low as thirty per cent or less. The adoption of a proposition by less

than thirty per cent of the electorate hardly represents an adequate expression of public opinion.<sup>20</sup> Such action, however, is rendered possible by the provision usually found that an initiated measure may be adopted by a majority of those voting on the proposition, no matter how small a minority it may be of the whole electorate. In order to prevent this, some states require that an initiated measure must receive the affirmative vote of a majority of those voting at the election at which the measure is submitted. This provision, however, makes the adoption of a measure too difficult, since the votes of those who vote at the election but not on the proposition are practically counted against it. An effective compromise has been adopted in Nebraska and a few other states, whereby an initiated measure must receive a majority of the votes cast on the proposition and also a certain percentage, varying from 30 to 40, of the total vote cast at the election.

The influence of ballot forms upon the adoption of referred measures may be illustrated by the experience of Illinois in the adoption of constitutional amendments under its constitution of 1870. The period prior to 1891 was one of the party ballot, as no official ballot was issued by the state. Under the law, political parties might, and almost invariably did, print on their ballots only one side of a proposition for a constitutional amendment. The result was that when the affirmative of such a proposition was printed on the ballots of a given party, all straight party votes for that party were counted in favor of the proposed constitutional amendment. Hence, where one or both of the two leading parties were in favor of a given amendment, it was comparatively easy to secure, almost automatically, a fairly large favorable vote upon it. Under this system, the requirement of the constitution that the proposed amendment must receive a majority of the votes cast at the election did not

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<sup>20</sup> In Switzerland, where the initiative and referendum have long been in use in some of the cantons and in 1891 were extended to the national government, an attempt was made to secure a larger vote on initiated measures by levying a fine on nonvoters. The result was to increase the number of voters who went to the polls, but it was found that some voters dropped blank ballots into the box, which illustrates the old adage about taking a horse to water.

operate to prevent any proposed amendments from being carried at the election.<sup>21</sup>

In 1891 the second period was inaugurated by the passage of the official ballot act according to which both the affirmative and negative of all propositions for constitutional amendment were printed on the general ballot for all parties after the list of candidates, and no provision was made for counting straight party votes in favor of the proposed amendment.<sup>22</sup> During the period from 1891 to 1899, three proposed amendments were submitted to popular vote, two of which were for the purpose of amending the amending clause so as to enable the general assembly to propose amendments to two or three articles of the constitution at the same session. All these proposed amendments were decisively defeated, none of them receiving a favorable vote equal to one-fifth of the total vote cast at the election, although two of them received a majority of the total vote cast on the proposition. The defeat of these proposed amendments was not due to any real opposition to them, but rather to the method of submitting them, combined with the constitutional requirement of a majority of all votes cast at the election. The propositions were usually printed on a remote corner of the ballot, "not to be discovered except by a man with a search warrant."<sup>23</sup> The defeat of the amendments was also doubtless to be accounted for in part by indifference on the part of the voters due to the lack of concreteness of at least two of the proposals and to the lack of any organized campaign in their favor.

In order to secure a larger vote on proposed constitutional amendments, the device of printing them on a separate ballot was advocated. This method was finally adopted by the separate ballot act, passed by the general assembly in 1899, according to which proposed constitutional amendments and other public measures were to be printed on a separate ballot and handed to the voter at the polls at the same time as the ballot

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<sup>21</sup> Gardner, "The Working of the State-Wide Referendum in Illinois," *American Political Science Review*, V, pp. 401, 416.

<sup>22</sup> *Hurd's Revised Statutes*, Chapter 46, Sect. 301.

<sup>23</sup> *Chicago Tribune*, May 3, 1895.

containing the names of the candidates. Since the enactment of this law, three proposed constitutional amendments have been submitted to popular vote, in 1904, 1908, and 1916. The first, providing for special legislation for Chicago, was carried by a substantial majority, after a spirited and well-organized campaign of education among the voters throughout the state. The second, authorizing a \$20,000,000 issue of canal bonds, was also carried by about the same majority. The proposed amendment of 1916, designed to enlarge the powers of the general assembly over the subject matter of the taxation of personal property, received a majority of the votes cast at the election for the legislative candidates, but failed by about 15,000 of receiving the necessary majority of the total vote of 1,343,000 cast at the election. Although in the case of all these amendments there was considerable publicity and agitation in favor of them, nevertheless it remains true that the separate ballot aided very considerably in securing large votes for the amendments. The constitutional requirement of a majority of all votes cast at the election, however, still remains as a very considerable handicap upon the adoption of any amendment.

In the states in which the initiative and referendum have been introduced, certain limitations rest upon the full freedom of operation of these devices. Thus, when an initiative measure has been once rejected, some states prohibit it from being resubmitted for a certain period of years or require a larger percentage of signatures on the petition if it is resubmitted within that period. The constitution of Massachusetts contains a lengthy list of subjects which are withdrawn from the operation of the initiative and referendum. The states generally make provision for adoption by the legislature of emergency measures without the possibility of invoking the referendum against them. Emergency measures are rather laxly defined by the constitution of Massachusetts as those "necessary for the immediate preservation of the public peace, health, safety, or convenience" (Art. XLVIII). A preamble to the proposed law declaring it to be an emergency measure must be adopted by a two-thirds vote in each house in order that the law may go into effect immediately without the possibility of a referendum. In Massa-



chusetts the governor, by filing a statement with the secretary of the commonwealth, may also declare a law to be an emergency measure, but no grant of any franchise may be declared to be such a measure. The power of the legislature to decide as to whether a law is an emergency measure may be subject to abuse, and that body may declare an emergency merely in order to avoid the possibility of a referendum.<sup>24</sup> In order to prevent this abuse, the question of whether an emergency exists may in some states be carried to the courts for final determination. This method of settling the matter, however, is likely to be slow and cumbrous.

The introduction of direct popular legislation has been an indication that the regular legislative bodies have not been altogether satisfactory. In some instances these bodies have proved to be representative, not of the people, but of the interests which prey upon the people. In such cases, the introduction of the initiative and referendum can hardly be characterized with justice as a blow at representative government, since the choice has been between direct legislation and misrepresentative government. These devices, as has been said, constitute an attempt to make representative government more representative. At any rate the regular legislative bodies have not been displaced but continue to form the ordinary and usual means of legislating. Moreover, the regular legislative bodies may enact, repeal, or amend initiative measures. So long as the regular legislative bodies continue to exist as an alternative means of enacting laws, the introduction of the initiative and referendum does not constitute a violation of the Federal guaranty of a republican form of government to the states. The Supreme Court of the United States has held this to be a political question,<sup>25</sup> and the political departments of the United States Government have acquiesced in the situation.

When the initiative and referendum were originally intro-

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<sup>24</sup> Legislative abuse of the emergency clause could be greatly minimized by a provision that emergency measures, although going into effect immediately, are still subject to referendum.

<sup>25</sup> *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U. S. 118 (1912).

duced, it was supposed and expected that they would be but seldom used, and would be reserved, like the "gun behind the door" for cases of emergency. Instances have occurred in Oregon and California, however, where as many as thirty or forty proposed measures have been submitted to the voters at the same election. There is as a rule little or no limitation upon either the number or character of the measures submitted, and, in practice, they are sometimes rather trivial, such as a measure for increasing the salaries of judges. The short ballot principle is as applicable to voting on measures as to voting on candidates for office, and its violation in either case places a greater burden upon the voters than they can reasonably be expected to bear. The people as a rule should be expected to legislate only upon a few simple and broad questions of public policy—questions of sufficient importance to arouse general interest.

The results of direct popular legislation have not always been happy. It has sometimes happened that measures which are in reality alternative have both been submitted at the same time and have both been passed. This occurred in Oregon in 1908 where two measures, one prohibiting net fishing and the other prohibiting wheel fishing, were both adopted. The result of this vote made any practicable method of fishing illegal, and the legislature had to intervene at its next session in order to remedy this situation. In the same state, an initiative measure was carried prohibiting the granting of free passes on railroads, but it failed to become a law because it contained no enacting clause. The legislature thereupon passed a bill requiring the granting of free passes in certain cases. On this bill, however, the referendum was invoked and the measure was defeated. These are illustrations of the ineptitude of direct popular legislation. In order to provide for the contingency of conflicting measures being adopted by popular vote at the same time, the rule has been adopted in some states that in such a contingency the measure receiving the larger number of votes shall be considered adopted.

Although there are some examples of direct legislation which exhibit a painful unfamiliarity with the technicalities of bill

drafting, the same observation may be made regarding the bills enacted by the regular legislature. If the latter need reference bureaus to assist in bill drafting, it is not surprising that the same is true of popular lawmaking. Every example of ineptitude in popular lawmaking may be matched by a similar instance of legislative bungling. Among numerous instances of the latter may be cited the case of a session of the Montana legislature whose enactments were found to be so full of mistakes that the secretary of state, in a note appended to the session laws, disclaimed all responsibility for the form in which the statutes appeared. One particularly atrocious mistake was that in which the legislature, intending to prohibit the sale of diseased meat, placed a severe penalty upon the sale of deceased meat.<sup>26</sup>

The introduction of the initiative and referendum produces a diffusion of legislative power throughout the electorate. The advantages of common counsel, the improvement of a measure through amendment and the interchange of ideas and opinions are not so easily obtainable in the case of initiative measures.<sup>27</sup> This situation necessitates the adoption of some means of integration which will serve to focus public attention upon the issues. This need has been recognized in some states, notably Oregon and California, which have provided for the circulation by the state of publicity pamphlets, containing arguments for and against the measures of proposed legislation submitted to popular vote. Doubtless many voters receiving these pamphlets consign them forthwith to the wastebasket, but they are a convenient means of information for voters who wish to cast their votes intelligently but have no time to make an independent investigation. They doubtless have an educative effect upon many voters and stimulate an interest in public affairs in many who might otherwise remain apathetic. Much has been done

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<sup>26</sup> For the character of recent measures submitted and the results of referendum votes, see S. Wallace, "The Initiative and Referendum and the Elections of 1922," *National Municipal Review*, April, 1923, pp. 192-204.

<sup>27</sup> Massachusetts endeavors to accomplish this purpose by giving the majority of the proposers, or first ten signers of the original petition, the right to amend the measure under certain circumstances.

in the various states to secure the accurate registration of the opinion of the voter when he goes to the polls. Such is the purpose of the Australian ballot system. Little has been done, however, to provide facilities for assisting the voter in forming a sound judgment upon the questions of public policy that he will be called upon to decide. Too much governmental interference in this respect would not be wise, but, if impartially and judiciously administered, governmental aid in this matter would do little harm and much good. The publicity pamphlets constitute a step in this direction. Nevertheless, the principal reliance for the formation of public opinion has been on the newspapers, since they continue to be the principal means of publicity, and the principal vehicle of information upon public questions. Enterprises, such as newspapers, whose enlightened management is of such great concern to the people cannot expect to evade the general tendency of the times toward bringing under public control or regulation businesses affected with a public interest. One of the prime requisites of democratic control is publicity, both upon the operations and processes of government, and upon the essential instrumentalities which make popular government possible.

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## CHAPTER VI

### THE LEGISLATURE: ORGANIZATION

THE state legislature, or general assembly, as it is officially known in many states, is, in spite of the restrictions under which it operates, the most important branch of the state government. It is more fundamental than the executive and judicial branches, since the organization and activities of the latter depend in part upon the laws relating thereto passed by the legislature. Moreover, the legislature is distinguished from the other two branches of the state government in that it is a body of general residuary or inherent legislative powers. In this respect it also differs from the national congress and from municipal councils. Although some legislative power is exercised by the judicial and executive departments and, in some states, by the people directly, the legislature remains the principal source of laws or policy-determining acts of the state government.

#### Historical Development

During the colonial period, elective assemblies arose, the earliest having been established in Virginia in 1619. There was also found in the colonies an appointive body, known as the governor's council, which, in addition to its function as an advisory body to the governor, acted as the upper house of the colonial legislature. The assemblies were looked upon by the colonists as representing their interests in the conflict which subsequently broke out with the colonial governors, representing the conflicting desires and purposes of the British government.

The control over the finances has always been recognized as such an important power that the authority which is able to exercise it is able largely to control the entire government and administration. It is interesting to note, therefore, that although

the colonial governors at first exercised some control over this matter, they gradually lost it as it was absorbed by the colonial legislatures. The struggle over the purse in the colonial governments reproduced on a smaller scale the historic contest between king and Commons in England, and the result in both cases was the same. The control of the funds gave the assembly an effective instrument of control over the governor. From control over the supply of funds it was a short step for the legislature to assume the right to direct the manner in which such funds should be spent. In some of the colonies the assembly also assumed the right to appoint financial officers, notably the provincial treasurers, and in this way acquired a more direct control over financial administration.

In the hands of the colonial governor, however, rested the important powers of summoning, proroguing and dissolving the assembly, and of recommending legislation, and over its acts he possessed an absolute veto. The latter power enabled the governor to prevent the enactment of laws which he considered obnoxious, although this power was somewhat limited through the practice of the assembly in attaching riders to bills, particularly those carrying appropriations. The power of dissolving the assembly was a weapon of large caliber in the hands of the governor, and even the threat of dissolution was sometimes sufficient to bring a recalcitrant legislature to terms, for such action might render it necessary for the members to undergo the expense and uncertainty of securing their reelection. Where the members, however, were certain of the support of the people, which was more frequently the case, a threat of dissolution naturally was less effective. Perhaps even more dangerous than the threat of dissolving a recalcitrant legislature was the failure to dissolve a subservient one, but this power was limited by the passage of triennial and septennial acts.<sup>1</sup>

In the contest between the colonial governor and the elective assembly, the people sided emphatically with the assembly, and this fact has an important bearing upon the respective positions assigned to the governor and legislature under the constitutions

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<sup>1</sup> Greene, *Provincial Governor*, 155.

drawn up in most of the American states during and shortly after the Revolutionary War. Revolutionary constitutions were largely adaptations of the colonial charters to new conditions and were framed in the light of colonial experience. In drawing up these new instruments of government, the framers were influenced to some extent by the prevalent theory of the separation of powers, or checks and balances, which many held to be the *sine qua non* of liberty. In pursuance of this principle, distributive clauses were placed in nearly all the first state constitutions. The framers, however, by no means carried the principle out to its logical conclusion in constructing the actual framework of government. They were, in fact, influenced more by conditions and experience than by theory.

The conflicts between the colonial executives and legislatures had embittered the men of that time against the exercise of executive authority. A habit of political thought, once definitely acquired, is not easily thrown off, even after the occasion for its existence has disappeared. Hence, in the Revolutionary constitutions, the predominant legal position was assigned to the legislature, which was made the controlling and regulating force in the new state governments, while the executive was rendered weak and inefficient both in organization and function. As Madison succinctly expressed it in the Convention of 1787, "The executives of the states are in general little more than ciphers; the legislatures omnipotent."<sup>2</sup>

Under the Revolutionary constitutions the legislative bodies were elective by popular vote in all the states, and in all but three, Pennsylvania, Georgia, and Vermont,<sup>3</sup> they were composed of two houses. In the colonial government, as we have seen, there had been executive councils which had served as the upper house of the legislature. In the new constitutions, these councils were continued, but were shorn of their legislative functions and a distinct body, known usually as the senate, was created to serve as the upper branch of the legislature. The

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<sup>2</sup> Elliot's Debates, V, 327.

<sup>3</sup> In these three states, however, there existed an executive council, with some power of participating in legislation, but too restricted in scope to give it the character of a second branch of the legislature.



senates were only one-third or one-fourth as large as the lower houses, but were also elective by popular vote, although in most states by a more restricted suffrage than the members of the lower house. The term of members of the senate was usually longer than that of members of the larger chamber, although in a few states it was but one year, which was the length of term for members of the lower house in nearly all the states. It is interesting to note that in Maryland the members of the senate were chosen by an electoral college for five-year terms, since this seems to have served as a model for the electoral college provided in the Federal Constitution for the election of the President of the United States.

In the first state constitutions few limitations are found upon the powers of the legislature. These constitutions themselves might, in most states, be amended by the legislature, and, consequently, the acts of the legislature, even if in apparent conflict with the constitution, were nevertheless considered valid. In most of the states, the legislature had the power of choosing the governor and the majority of the state executive officers. In some states the legislature possessed an indirect control over appointments through its power of choosing the executive council, which approved such appointments as might be made by the governor. In New York there was a council of appointment, consisting of four state senators, elected by the assembly and presided over by the governor, which had the power of appointing practically all the administrative and judicial officers of the state, except a few who were appointed by the legislature or elected by the people.

Not only was the legislature thus possessed of a large control over the administration, but its power over legislation was also increased and the power of the governor in this field was correspondingly curtailed. The governor's powers of prorogation,<sup>4</sup> dissolution and absolute veto over the acts of the legislature, which he had exercised in colonial times, were taken from him. In one state, however, the Commonwealth of Massachusetts, a qualified veto power over acts of the legislature was

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<sup>4</sup> In New York, the governor might prorogue the legislature, but only for a period of sixty days in any one year.

retained by the governor. In New York, moreover, in order to prevent hasty legislation, a council of revision was provided, consisting of the governor, the chancellor, and the judges of the supreme court, or any two of them, together with the governor. This body had the power of veto, which might be overridden, however, by a two-thirds vote of both houses of the legislature.

Although the legislature was at first almost omnipotent, not only legislatively but also administratively and in some states even constitutionally, during the nineteenth century it gradually declined in power. In the new constitutions adopted during this period and in amendments to the older, the selection of the governor and other state executive officers, which had at first in most states been vested in the legislature, was transferred to the electorate. Moreover, the powers and emoluments of the governor were less frequently left at the complete mercy of the legislature. In particular, the veto power was extended to him, and, at the same time, the fraction of the legislature necessary to overcome his veto was increased. Thus, the New York Constitution of 1821 abolished the council of revision, transferred the veto power to the governor, and required a two-thirds vote of the legislature to override it. At the same time the council of appointment was also abolished.

This decline of the legislature was due primarily to the loss by the people of the complete confidence which they had originally possessed in that body as their immediate representatives.<sup>5</sup> Sad experience had taught them that such confidence was often misplaced, and specific cases of legislative corruption seemed to emphasize the need of curtailing the great powers of the law-making body. The extension of the executive veto seemed to meet with the approval of the majority of the people. The extravagance of state legislatures in voting appropriations and bond issues for internal improvements in excess of the resources of the state to meet such charges, and frequently over the veto

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<sup>5</sup> This loss of popular confidence was in turn due partly to the growing inadequacy of a legislative body, composed of amateurs and meeting intermittently, to meet the increasingly difficult and technical problems of government.

of the governor, had brought a reaction. A common feeling was expressed by Mr. Hoffman in the New York constitutional convention of 1846 when he remarked that he "had heard of the expression often from men of every class, at the close of a legislative session, of thanks to God that the legislature had adjourned without doing any more mischief."<sup>6</sup>

A striking tendency of recent state constitutions has been the further limitation of legislative power. The increasing length of such constitutions has been due in part to the efforts of the framers of those instruments to place additional restraints around legislative action. Such restrictions relate not only to the subject matter of legislation, including the fields of both public and private law, but also to legislative procedure. Administrative organization is to a greater extent found embodied in the fundamental law, and the movement for municipal home rule has led to the insertion in the constitution of provisions limiting the power of the legislature over cities. Many forms of special legislation are also generally prohibited. Within the last two decades an important limitation on the legislature has developed through the assumption by the people of the power of direct legislation, by means of the state-wide initiative and referendum, both for constitutional and statutory legislation.

### The Bicameral System

As pointed out above, three of the original thirteen states operated at first with single-chambered legislatures, but this plan was soon abandoned and, by 1836, all the states were operating under the bicameral system. This development was doubtless due in part to historical causes, but was also traceable to the prevalence of the idea of checks and balances, whose influence can be perceived throughout the organization of the first state governments. The legislature, although at first the most favored branch of government as to the extent of its powers, was not exempt from the widespread notion that all branches of the government should be subjected to checks and

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<sup>6</sup> Debates and Proceedings, p. 285.

balances. The bicameral system has become so well established in the states as to be looked upon by many persons as a matter of course, and it requires an unusual degree of political imagination to visualize a change in this respect. Recently, however, some dissatisfaction with the plan has developed and proposed constitutional amendments providing for the abolition of one house have been voted upon in some Western states, but have failed of adoption. In the case of the National Congress, the need for two houses, one in which the states and the other in which the population should be represented, added solid reason to historical precedent in supporting the application of the bicameral system. But in the case of the states and especially of the cities, such a reason has little cogency. On account of their subordinate municipal character, there is little need for the further check of a two-chambered legislature. The bicameral system has sometimes been defended on the ground that it prevents hasty and ill-considered legislation and that each house will remedy the defects in legislation passed by the other. Consideration of the same bill by two houses, however, does not necessarily insure more careful consideration than would be given by one house. Each house may expect the other to correct its errors of haste and judgment, whereas if there were but one house, greater care would probably be taken because the action on every measure would be of more consequence. The bicameral system, by complicating the process of legislation, tends to distract public attention and interest and enables legislators to evade responsibility. Measures are sometimes introduced and passed in one house to satisfy an insistent public demand, only to be killed in the other.

Most of the arguments which have been made in favor of the bicameral system have had special reference to the legislatures of sovereign national states, and are not necessarily applicable to subordinate legislative bodies such as those found in the states. If a check is needed to avoid the results of hasty and ill-conditioned legislation in the states, it may be found in the governor's veto power, in the popular referendum in some states, and in the power of the courts in all states

to declare void legislation in conflict with the limitations of the Federal and state constitutions. The cities are pointing the way to reform, the unicameral system having been introduced in the majority of the principal cities of the country. In the unicameral city councils it has been found that friction is reduced and fewer means exist for impeding the passage of salutary measures, nor is the council so easily controlled by sinister influences. Similar results would probably follow the introduction of the unicameral legislative body in the states. The legislatures have largely ceased to be deliberate bodies and it is only in the committees that adequate consideration is given to measures. Through the devices of conference committees and joint committees, some approach has actually been made to the unicameral system in deliberating on bills. A model for this system in the states may be found in the constitutional convention, which is always organized as a single house. It is true, however, that this body does not pass appropriation bills and is subject nearly everywhere to the check of the popular referendum.

In this connection it should be pointed out that the adoption of the unicameral system would simplify the problem of bringing the legislative and executive departments of our state governments more closely together. There is at present a lack of established means for close coöperation between the executive and legislative departments, on account of the over-emphasis placed upon the principle of separation of powers. The rule of the Illinois house of representatives, adopted in 1913, giving to administration bills sponsored by the governor priority on certain days over all except appropriation bills, was a step in the right direction. It both laid upon the governor the duty of having a legislative program and also tended to bring the legislature into the open in its attitude toward such program. If there is to be given more formal recognition of the governor's right of initiative in legislative matters, he should be accorded the right to support his program before the legislature as well as before its committees. Responsibility of the governor to the legislature, however, along the lines of the parliamentary form of government could not be so well worked

out as long as the legislature is composed of two coördinate branches.<sup>7</sup> The functions which are now performed separately by the so-called upper house of the state legislature, such as the confirmation of appointments, are mostly executive in character, and it would make for the concentration of responsibility if they were entrusted solely to the executive branch of the government.

Arguments in favor of the bicameral system are usually predicated upon a dissimilarity in the structure and composition of the two bodies. Thus, the author of the *Federalist* refers to the need of "dissimilarity in the genius of the two bodies" and to the desirability of distinguishing "them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government."<sup>8</sup> Although formerly and in other countries, distinctions of rank and wealth were made in the representation found in the two houses, the advance of political democracy has tended to efface such distinctions. The differences between the two houses of the state legislature are slight, so that one house is little more than the "imitation-half" of the other. In a federal form of government, such as that of the United States, the two houses may be utilized as a means of according representation both to units of government and to population. Although the states are not federal governments, yet the existence of two houses may afford a means of compromising the conflicting claims for representation by the rural and urban districts.<sup>9</sup>

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<sup>7</sup> It may be noted in this connection that the Model State Constitution, prepared by the committee on state government of the National Municipal League, provides for a unicameral legislature and accords the governor and heads of executive departments seats in that body. (Sects. 13, 47.)

<sup>8</sup> *The Federalist*, No. 62.

<sup>9</sup> This, however, is an incidental, and not an essential advantage of the bicameral system.

As a result of a study of the Wisconsin legislature, W. Thompson reaches the conclusion that the bicameral system in that state has justified itself, on the ground that the second house has checked hasty and unwise legislative measures, such as the bill to abolish the national guard. *National Municipal Review*, October, 1923, pp. 601, 602. This seems to be a somewhat negative view of the function of legislation, and

LEGISLATIVE STATISTICS AND GOVERNOR'S TERM

STATE	NUMBER OF MEMBERS		LENGTH OF TERM (YEARS)		Regular Sessions	Limit of Session (days)	Capital	Governor's Term
	Senate	House	Senate	House				
Maine .....	31	151	2	2	Biennial	None	Augusta	2
New Hampshire ..	24	325	2	2	Biennial	None	Concord	2
Vermont .....	30	247	2	2	Biennial	None	Montpelier	2
Massachusetts .....	40	240	2	2	Annual	None	Boston	2
Rhode Island .....	39	100	2	2	Annual	60	Providence	2
Connecticut .....	35	268	2	2	Biennial	5 mo.	Hartford	2
New York .....	51	150	2	1	Annual	None	Albany	2
New Jersey .....	21	60	3	1	Annual	None	Trenton	3
Pennsylvania .....	50	208	4	2	Biennial	None	Harrisburg	4
Delaware .....	17	35	4	2	Biennial	60	Dover	4
Maryland .....	29	118	4	4	Biennial	90	Annapolis	4
Virginia .....	40	100	4	2	Biennial	60	Richmond	4
West Virginia ..	30	86	4	2	Biennial	1	Charleston	4
North Carolina ..	50	120	2	2	Biennial	60	Raleigh	4
South Carolina ..	44	124	4	2	Annual	40	Columbia	2
Georgia .....	44	193	2	2	Annual	50	Atlanta	2
Florida .....	32	77	4	2	Biennial	60	Tallahassee	4
Kentucky .....	38	100	4	2	Biennial	60	Frankfort	4
Tennessee .....	33	99	2	2	Biennial	75	Nashville	2
Alabama .....	35	106	4	4	Quadrennial	50	Montgomery	4
Mississippi .....	45	136	4	4	Biennial	None	Jackson	4
Arkansas .....	35	100	2	2	Biennial	60	Little Rock	2
Louisiana .....	39	100	4	4	Biennial	60	Baton Rouge	4
Texas .....	31	143	4	2	Biennial	None	Austin	2
Oklahoma .....	44	111	4	2	Biennial	60	Oklahoma City	4

LEGISLATIVE STATISTICS AND GOVERNOR'S TERM—(Continued)

STATE	NUMBER OF MEMBERS		LENGTH OF TERM (YEARS)		Regular Sessions	Limit of Session (days)	Capital	Governor's Term
	Senate	House	Senate	House				
Ohio .....	37	125	2	2	Biennial	None	Columbus	2
Indiana .....	50	100	4	2	Biennial	61	Indianapolis	4
Illinois .....	51	153	4	2	Biennial	None	Springfield	4
Michigan .....	32	100	2	2	Biennial	None	Lansing	2
Wisconsin .....	33	100	4	2	Biennial	None	Madison	2
Minnesota .....	67	130	4	2	Biennial	90	St. Paul	2
Iowa .....	50	108	4	2	Biennial	None	Des Moines	2
Missouri .....	34	142	4	2	Biennial	70	Jefferson City	4
Kansas .....	40	125	4	2	Biennial	50	Topeka	2
Nebraska .....	33	100	2	2	Biennial	None	Lincoln	2
South Dakota .....	45	104	2	2	Biennial	60	Pierre	2
North Dakota .....	49	113	4	2	Biennial	60	Bismark	2
Montana .....	41	95	4	2	Biennial	60	Helena	4
Idaho .....	44	67	2	2	Biennial	60	Boise	2
Wyoming .....	27	57	4	2	Biennial	40	Cheyenne	4
Colorado .....	35	65	4	2	Biennial	60	Denver	4
New Mexico .....	24	49	2	2	Biennial	60	Santa Fé	2
Arizona .....	19	35	2	2	Biennial	60	Phoenix	2
Utah .....	20	55	4	2	Biennial	60	Salt Lake City	2
Nevada .....	22	53	4	2	Biennial	60 <sup>2</sup>	Carson City	4
California .....	40	80	4	2	Biennial	60	Sacramento	4
Oregon .....	30	60	4	2	Biennial	40	Salem	4
Washington .....	42	97	4	2	Biennial	60	Olympia	4

<sup>1</sup> Split session: first part, 15 days; recess over 30 days; second part, 45 days.<sup>2</sup> Split session: first part, 30 days; recess, 30 days; second part, no limit.

In Texas, if the session lasts longer than 60 days, the per diem compensation is reduced from \$5 to \$2.

Of the states having biennial legislative sessions, those of Virginia, Kentucky, Mississippi and Louisiana meet in the even years; all others in the odd years. Except in Georgia, Florida and Louisiana all regular sessions begin in January.



### Differences between the Houses

In all the states the senate is a smaller body than the so-called lower house or house of representatives. In some of the New England states, owing to the town system of representation, the lower houses are of extraordinary size, running to 325 in New Hampshire, but the size of the upper houses in these states is below the average. The smaller size of state senates suggests the greater dignity and importance of the position of senator as compared with that of representative, since the vote of a senator on legislative measures is of relatively greater weight. The size of the two branches is usually fixed in the constitution, and this would seem to be the better plan. Where the size is left to legislative determination, the tendency is to increase the size at each periodic reapportionment of members, in order that representation from districts having a relatively small growth in population may not be reduced. A proposition to reduce the size of the legislature would hardly meet with approval in that body.

As to the composition of the two branches the original idea seemed to be that the senate or so-called upper house should contain men of wealth and social standing, while the lower should be composed of ordinary persons or representatives of the plain people. This idea has now been abandoned. In most states, however, the relative attractiveness of the position of senator is further enhanced by the longer term, although in a few states the terms of members of both branches are the same. In the majority of states the term of senators is four years, while that of representatives is two years. Another less important dif-

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a revamping of the somewhat discredited doctrine of checks and balances. Such a fundamental change as the adoption of the unilateral system, however, is not likely to come suddenly in the country as a whole, nor even in a particular state. It is more likely to be brought about gradually through the adoption of some such device as that of joint committees, as found in the Massachusetts legislature. For further consideration of this subject, see articles by J. W. Garner on "Legislative Organization and Representation," *Proceedings of the Illinois State Bar Association*, 1917, pp. 377-382; "The Legislative Department," *Illinois Law Bulletin*, December, 1919, pp. 301-307, and his *Introduction to Political Science*, pp. 427-440.

ference between the two branches is the higher age qualification sometimes required for senators. Furthermore, it is generally true that more senators have had previous legislative experience than have members of the lower house. After serving for a term or two in the lower house, a member frequently looks forward to promotion to the senate. Since, in most states, only one regular session is held in each biennium, a representative elected for the first time has but little opportunity of learning the business and methods of legislation before it is necessary for him to start his campaign for reelection, if he wishes to continue in the position, while on the other hand, a senator has a greater opportunity of acquiring experience in legislative methods and procedure. In a number of states only half of the senators are elected at the same time that all the representatives in the lower house are elected, so that the senate is likely to be a more continuous body. In each regular session in such states, at least half of the senators are "hold-over" members, having served in the preceding regular session, while, on the other hand, it is at least possible that every member of the lower house may never before have served in the legislature. This, however, is hardly ever actually the case, since some members of the lower house are in practice almost always re-elected. Other differences between the two houses exist, as will be noted later, with respect to their powers.

### Apportionment of Members

In the American states there are two main principles upon which representation is based: the first is the people *en masse*, and the second is the people by governmental subdivisions. Various combinations of these two main methods of representation are also found. The first principle of representation is adopted in the election of the state executive officers, such as governor, lieutenant-governor, secretary of state, *et cetera*. This principle is also applied in the election of the Presidential electoral college, United States senators, and members of the lower house of Congress in states having but one member and occasionally in other states where the legislature has failed to provide as many congressional districts as the number of

members to which the state is entitled. It is also applied in the operation of the state-wide referendum on constitutions, constitutional amendments and ordinary legislation. In all of these cases a vote cast anywhere in the state counts just as much as a vote cast anywhere else in the state. There is no over- or under-representation of one part or section of the state as compared with another. If the members of the state legislature were elected in a state-wide election on a general ticket, there would arise no difficulties connected with the division of the state into representative districts and there would be no possibility of a gerrymander. A combination of the general ticket plan with district representation might be worked out that would probably give greater satisfaction than the present plan, especially if the bicameral system were abolished and a one-house legislature introduced. The complete adoption of the general ticket plan of electing the legislature, however, is hardly practicable because it would make the ballot too long and would leave no room for minority representation. In all the states, therefore, we find that the legislatures are elected on the plan of district representation. These districts are either especially created for this purpose or are already used for local governmental purposes, or, more generally, a combination of these two kinds of districts is found.

The division of the state into districts and the apportionment of members is usually made by the legislature upon the basis of population as determined by the Federal census. The constitutions usually require that the districts shall be composed of compact and contiguous territory, bounded by county lines if possible, and shall contain as nearly as practicable an equal number of inhabitants. In order to make allowance for changes in population, a periodic reapportionment is generally required, usually every ten years. Of these requirements, that of contiguity of territory must be absolutely complied with, but compactness of territory and equality of population may be only approximately attained. For the purpose of favoring the party in control of the legislature the state may be divided into districts in such a way that the opposition party will have a large majority in a few districts, while the party in power will have

a small majority in a large number of districts. This is known as gerrymandering. Under this plan, some districts may exhibit very queer shapes, and in practice the districts are sometimes very unequal in population. The result is that a minority of the population may control a majority of the legislature. This is rendered possible on account of the prevalent system of plurality elections in single-member districts. Under this system the weaker of two major parties is not likely to receive adequate representation even when there is no attempt to use the gerrymander, and third parties are not usually represented at all. This condition might be corrected by the introduction of the system of proportional representation with the single transferable vote.

In spite of the fact that the requirement of periodic reapportionment in the constitution may be apparently mandatory, the legislature sometimes fails to carry out the mandate. Thus, no reapportionment has been made in Illinois since 1901. Such a failure to reapportion operates as a practical limit upon the representation of those sections of the state which are growing most rapidly in population. There seems to be no legal method of compelling the legislature to carry out the constitutional mandate in this respect.<sup>10</sup>

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<sup>10</sup> In order to avoid this difficulty, the proposed Illinois constitution of 1922 provided that "if the general assembly fails to make any such apportionment, it shall be the duty of the secretary of state, the attorney-general, and the auditor of public accounts to meet at the office of the governor within ninety days after the adjournment of the regular session of the year designated for that purpose and make an apportionment as provided by the constitution (Sect. 24)." The governor was not included in this board because the courts would probably refuse to issue a mandamus to a board of which the governor was a member.

In Missouri, the constitution of 1875 provided that if the legislature should fail to redistrict the state after a Federal decennial census, this duty should be performed by the governor, attorney-general, and secretary of state. An attempt of these officers in 1921 to make a reapportionment in accordance with this constitutional mandate was, however, declared invalid by the state supreme court on the ground that their authority to do so had been withdrawn by the constitutional amendment of 1908 providing for the initiative and referendum, which impliedly concentrated legislative power in the general assembly. *State v. Becker*, 235 S. W. 1017 (1921). Under the proposed new Missouri constitution

The courts of some of the states have been rather lenient in construing the power of the legislature in making the apportionment. Thus, in the Illinois apportionment act of 1893, both greater equality in population and greater compactness of territory might have been secured. The constitutionality of the act was therefore attacked in the supreme court, but the court upheld the act as constitutional. The reasoning of the court was that

an act apportioning senatorial districts is unconstitutional if it appears that the constitutional requirements of compactness of territory and equality in population have been *wholly* ignored . . . but if considered and applied, although to a limited extent only . . . the act is constitutional, although the legislature may have imperfectly performed its duty. The question whether the constitutional requirements . . . have been applied at all, is one which the courts may finally determine; but whether or not the nearest practicable approximation to perfect compactness and equality has been attained is a question for the legislative discretion.<sup>11</sup>

The Illinois apportionment act of 1901, though containing the inequalities already noted, was also upheld as constitutional by the supreme court of that state. Less than ten years had elapsed since the previous apportionment act, but the court held that the requirement of a decennial apportionment means that the legislature may make one apportionment, but only one, within each period of ten years intervening between the taking of the Federal census. The court also made a distinction between the absolute constitutional requirements and those which permit of legislative discretion. The former are that the districts shall be bounded by county lines—except where a county contains sufficient number of inhabitants to make more than one district—that they shall be composed of contiguous territory, and that no district shall contain less than four-fifths of the senatorial ratio. The latter are the requirements regarding compactness of territory and equality of population.

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of 1924, the power to redistrict is taken away from the legislature and conferred upon the governor, secretary of state, attorney-general, state auditor, and state treasurer, or a majority of them. The reapportionment, as thus made, is not to be subject to the referendum.

<sup>11</sup> *People ex rel. v. Thompson*, 155 Illinois, 451 (452).

If (said the court) the absolute requirements . . . have been observed . . . and there is an approach toward equality in population as determined by the ratio, and the districts are in some degree compact, the court cannot hold the act invalid upon the ground that a nearer approach toward equality of population and compactness of territory could have been made.<sup>12</sup>

Within the wide limits of discretion thus allowed the general assembly, it is possible for that body to gerrymander the state very effectively in the interests of the political party which is, for the time being, in control of the lawmaking power.<sup>13</sup>

### The Bases of Representation

The earliest system of representation as established in England adopted the local community as the basis or unit to which representation was accorded without regard to population. It was natural that the same plan should have been adopted in the American colonies. Even until well into the nineteenth century, cities were comparatively small, and consequently, although population was not taken into consideration primarily in fixing representation, as a matter of fact there was no very great or serious divergence from the population basis of representation.

With the shifting of population in the nineteenth century, however, and the growth of manufacturing and industrial cities, many of the rural communities in the south of England came to be what were called "rotten boroughs." The same development also took place in the United States, until by the beginning of the twentieth century, the departure from the principle of popular representation had become very great and

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<sup>12</sup> People *ex rel. v. Carlock*, 198 Illinois, 150 (151).

<sup>13</sup> Although the courts in some states have shown a stricter attitude toward gerrymandering than have those of Illinois, still, in general, they hesitate to interfere with such acts, especially as the result of declaring them void would usually have merely the effect of bringing into operation a previous act containing even more gross inequalities among the districts.

If the legislature were elected by the system of proportional representation with the single transferable vote, the state would be divided into districts from each of which a group of members would be chosen in proportion to its population, but the districts would not need to be approximately equal in population. See the Model State Constitution of the National Municipal League, Sect. 13.

serious in some of the states. This was especially true in the case of some of the older states on the Atlantic seaboard, mainly in New England, where the town system of local government influenced the plan of representation. In the New England states, with the exception of Massachusetts, the constitutions generally provide that each town shall have at least one representative in the lower house. This general requirement is supplemented in Connecticut by the provision that no town shall have more than two representatives and in Rhode Island by the provision that no town or city shall have more than one-fourth of the total membership of the lower house. This narrowly restricts the representation of such cities as Providence and Hartford. In Rhode Island, the under-representation of the cities is further accentuated by the provision that each town or city shall have only one senator. In other states outside of New England equal representation of counties in the senate is found. Thus, in New Jersey, Maryland and South Carolina each county is entitled to one and only one senator. This provision produces great under-representation in New Jersey in the case of two populous counties, containing large cities. Baltimore is not affected by this provision, since it is not situated in a county, but a special provision limits it to six senators out of a total of twenty-nine, although it has about half the total population of the state. It is also limited to less than one-third of the representatives in the lower house. Wilmington, Delaware, is in much the same situation as Baltimore with reference to its representation in both houses. Philadelphia is also limited by the provision that no city or county in the state shall have more than one-sixth of the total number of senators. The constitution of New York limits the number of senators which any one county may have to one-third, and the number which any two adjoining counties may have to one-half. New York City, however, is not yet seriously affected by this provision, since it includes five counties and might, therefore, elect more than half the senators.<sup>14</sup>

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<sup>14</sup> It should be noted, however, that the apportionment provisions of the New York constitution with reference to the Assembly, giving each county, except Hamilton, one representative, irrespective of population,

In about one-third of the states, the constitutions provide that each county shall have at least one representative in the lower house. This provision practically operates to restrict the representation of the more populous counties and to give undue representation to the sparsely populated counties because of the general policy of definitely fixing in the constitution the exact number of members in each house. In the states having county representation there are usually a number of counties having less than the representative ratio, that is, the quotient arising from dividing the population of the state by the number of members. There are some of these states in which some counties have even less than half the ratio. The resulting overrepresentation of such counties can be allowed, of course, only by depriving the more populous counties of some of the representation to which, on the basis of population, they would be entitled.

Even in states which do not have county representation, the counties are not entirely ignored, but it is usually provided that representative districts shall follow county lines and that, in forming such districts, no county shall be divided except when it includes more than one district. Where county lines are thus taken into consideration, it is impracticable to form the districts so that they shall contain exactly equal population. Even if this were done so that, at any given time, each district contained exactly the same number of inhabitants, this condition would quickly change with the shifting of population, so that inequalities would arise. In order to provide for this contingency, the constitutions usually provide that periodic reapportionments shall be made. The usual interval between reapportionments is ten years, and in most states the figures of the Federal Census are adopted as a basis. Where, as happens in some states, no requirement of periodic reappor-

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has had an important effect upon the political history of the state, since it makes it almost impossible for the principal minority party in the state to gain control of the Assembly. One result has been a movement for an initiative-petition method of proposing constitutional amendments, since the legislature, as now constituted, is not likely to recommend an amendment that changes the rule of apportionment.



tionment is found, the inequalities are naturally greater. Even in some state where such a requirement is found, the constitutional provision has sometimes been ignored by the legislature, as in Illinois, resulting in a progressively increasing inequality between the different districts.

Some states have adopted as a basis of representation not the total population but a restricted portion of the population, or the number of inhabitants remaining after deducting certain classes. Thus, Oregon adopts the white population as a basis; New York and North Carolina exclude aliens in determining the basis; Massachusetts and Tennessee base representation on the number of qualified or legal voters. The last-named provision would operate in most states to exclude aliens. Logically the voting population would seem to be a better basis than the total population. The theory involved in the second section of the Fourteenth Amendment to the Constitution of the United States is apparently that representation should be based on voting population. Such a provision would operate against the large cities as compared with the total-population basis, since, in determining representation, the floating and alien population found in considerable numbers in most large cities would be eliminated. Such an elimination would naturally increase proportionately the representation of the rural districts, but, now that women have been granted full suffrage, the voting population would seem to be a fairer basis of representation than the total population. If a person is not considered fit to vote for representatives, there would seem to be no good reason why he should be counted in determining the basis of representation.

From this brief review of the provisions regarding representation found in the different states, we may pass to a consideration of the arguments for and against the different methods adopted. The historic New England system of equal representation of towns, without regard to population, however justifiable originally, is quite indefensible from the standpoint of its present operation. It is entirely out of harmony with the modern trend of democratic thought. On the other hand, the democratic theory should not be pushed to the extreme of

holding that the lines of local governmental areas should be entirely disregarded and the state divided into equally represented districts containing absolutely equal blocks of population. The objections to such a plan are obvious. It would open a wide opportunity for gerrymandering the state on a larger scale and in a more obnoxious manner than when county lines are regarded. Even under present conditions, a comparison of party votes with party representation in most states shows that the percentage of the representatives in both houses controlled by the majority party is usually much greater than the percentage of its popular vote for governor, while the percentage of representatives controlled by the minority party is usually much less than the percentage of its popular vote.<sup>15</sup> The constitutional requirement that the legislature shall consider county lines in making the apportionment tends to check somewhat the evils of the gerrymander. Mere representative districts formed without regard to county lines, moreover, would be quite artificial, while the counties have to some extent a social and political unity.

It does not follow from the above considerations, however, that each county should have a representative in the legislature, especially in states where there are wide variations in the density of population in different sections of the state. Such representation could not, as a rule, be granted, even in the lower house, consistently with equal representation for all parts of the state, without making that house entirely too large for efficient work. It might be argued that counties should have representation in the state legislature on the analogy of the system of representation in county boards of supervisors and in Congress. In the county boards, it is true, each township usually has one representative, without regard to population, and, although populous townships may be allowed more than one, urban districts are usually under-represented. But the county

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<sup>15</sup> It should be noted that this situation is due not only to the practice of gerrymandering, but also to the fact that, under the system of single-member districts and simple plurality elections, a slight preponderance of the majority party in a large number of districts is likely, and results in seriously disproportionate representation.

has aptly been called the "dark continent" of American politics, and it is hardly likely, therefore, that we can derive much light on this question from that source.

It might be argued that each county in the state should have at least one representative in the lower house and support for this position sought from the fact that the Constitution of the United States provides that each state shall have at least one representative in the lower house of Congress. The analogy, however, is defective. The states, of course, are not federal governments, nor do the counties occupy the same position in the states that the states do in the Union. Moreover, the operation of the provision would be different in the two cases. Such a provision in most states would give to a considerable number of counties over-representation, while in the case of the lower house of Congress, Nevada and a few other states fall below the ratio of representation, but the amount of over-representation in this case is comparatively small. This result is due to the fact that the size of the House of Representatives at Washington is greater than that of the lower house in any state and much greater than in most states. Moreover, there is no constitutional limitation upon its size such as is found in most states with regard to both houses of the legislature.

When the Federal Constitution was drawn up state pride was strong and the confidence of the public men of that time in the political capacity of the people was comparatively low. Much was said about the danger of popular assemblies being swayed by excitement and passion. The framers therefore provided for representation on the basis of population in only one house, and not fully on that basis even in that house. Since the Constitution was adopted there has been a decrease in the feeling of state pride and a simultaneous growth in the general confidence in the political capacity of the people. Hence, it seems probable that, if the Convention of 1787 were meeting now in our present more advanced state of thought upon these matters, it would accord a larger recognition to the principle of population as the basis of representation. On the other hand, it is no doubt true that, if the members of such a convention as that of 1787, whether meeting at that time or now,

had reason to believe that any one state would ever have sufficient population to control the House of Representatives, they would have introduced restrictions so as to prevent it.

In favor of representation in both houses in the state legislature on substantially a population basis, it may be argued that the legislature should not have the power of levying taxes and passing other laws which the people must obey unless the people have been accorded equal representation in the body which makes the laws. If large cities are not accorded the representation in the legislature to which their population as compared with that of the rural districts would entitle them, many residents of the cities may hold in disrespect a law in the making of which they consider themselves not to have been properly represented. Equal representation upon a population basis may therefore be conducive to a more effective enforcement of the law, since it tends to bring the provisions of the law more in accordance with public opinion, upon which its enforcement ultimately depends. If the code of morals of the cities and the rural districts differ so that no general law will meet the approval of state-wide public opinion, there is no good reason why either side should attempt to cram its code down the throat of the other by general law, but local autonomy in such matters should be allowed.

Again, it may be argued that there is no difference in principle between allowing every voter equal weight in choosing state executive officers and allowing him equal weight in choosing representatives in the state legislature. Through his veto power and his positive influence in legislation, the governor is as important a factor in the work of the legislature as a considerable group of that body. Yet it is not suggested that the cities should have less proportional weight than the rural districts in choosing the governor.

On the other hand, one may sympathize with the feeling of the rural districts that they do not want to be dominated by the city political machine. But there is also a machine in the rural districts which one hears less about because it meets with less opposition. Most new movements and so-called radical ideas which point the way of progress and endanger

the hold of the majority political party emanate from the cities, while the rural districts are inclined to be more conservative. If the rural districts are much over-represented, the need for carrying the elections in those districts becomes greater if the political party is to control the legislature. The efforts of the party organization may therefore be concentrated upon the rural districts with the consequent greater danger of corruption. On the other hand, it is probably true that in the rural communities where everybody knows everybody else, the voters can usually form a more intelligent estimate of the qualifications of the candidates, and the machine may therefore be practically compelled to put up better candidates for the legislature in the rural districts than in the cities.

This is not a question upon which either side can afford to insist to the last ditch upon its extreme claims and refuse to compromise. The definite trend of modern democratic thought requires that the population basis of representation should be conformed to as nearly as practicable consistently with adequate recognition of the locality principle of representation. No county should have separate representation if its population is less than half the representative ratio, but should be combined with others to form a representative district. On the other hand, no one county should be allowed to dominate the legislature of the state in both branches.<sup>10</sup>

A compromise of these opposing interests which readily suggests itself is that the population basis of representation should be adopted in one house and the community principle in the other, so that the urban districts shall control one and the rural districts the other. This solution seems attractive on its face, but objections may be urged to it. Such a device may lead to undue friction between the two houses and possible deadlock upon the legislative matters that vitally affect the interests of either section of the state. Moreover, it may lead to a division of party responsibility for the work of legis-

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<sup>10</sup> In California, it seems that the struggle over representation in the legislature is not so much between urban and rural districts as between two cities, San Francisco and Los Angeles. See V. J. West's article in *National Municipal Review*, July, 1923, p. 370.

lation, where one party has a majority in the city and the other in the rural districts.

If this form of compromise be rejected as impracticable, and if it be accepted as inevitable that complete adoption of the population principle of representation is impossible where it would lead to domination of the state by one city or county, there remain two principal avenues of escape whereby the city may emancipate itself from rural control. These are the initiative and referendum and constitutional home rule. The former avenue, if adopted, would enable the people of the cities to have proportionate weight according to population in direct legislation, without regard to the degree of their underrepresentation in the regular legislative body. This is probably one reason why the introduction of the initiative and referendum is opposed by the rural districts. Without regard to the contest between city and country, however, the initiative and referendum may be objected to on general grounds. The more promising avenue of escape for the cities, therefore, seems to be constitutional home rule of a broad and liberal nature. If the city is not allowed to govern itself through the legislature, then it must be allowed to govern itself directly.<sup>17</sup>

### Election of Members

The old adage, "where annual elections end, tyranny begins" was at first generally applied in legislative elections, but the tendency has been towards a longer term and legislators are now usually elected biennially, but, in states where the members of the upper house serve for four-year terms, only one-half of the senate is chosen at each biennial election. In order to be eligible for the position, a legislator must have certain qualifications usually laid down by law, such as those relating to age, citizenship of the United States and of the particular state and residence for a certain time not only in the state but

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<sup>17</sup> J. M. Mathews, "Municipal Representation in State Legislatures," *National Municipal Review*, March, 1923, pp. 135-141.

It is not to be supposed that even constitutional home rule would satisfy cities altogether, since state legislation passed under the police power, and not in accordance with urban ideas, would doubtless continue.

also in the particular district represented. Formerly property qualifications were also generally required, at least for membership in the upper house, but these have now been abandoned. In a few states there is no legal requirement of residence in the district, but the rule is nevertheless just as strictly followed, being well grounded in unwritten law or custom. There are thus in the legislature no representatives of the general interests of the state at large, but each member, being elected from a comparatively small district, is likely to think first of the local and special interests of his district.

A provision which was early inserted in state constitutions and is still generally found is that disqualifying from a seat in the state legislature office-holders under either the Federal or state governments. Thus, the constitution of Nebraska declares that "No person holding office under the authority of the United States, or any lucrative office under the authority of the state, shall be eligible to or have a seat in the legislature." This prohibition was merely an application of the general principle of separation of governmental powers. It was doubtless incorporated on account of a fear of possible tyranny resulting from too much concentration of power and on account of a fear that the governor might exercise undue influence over the members of the legislature by appointing or refusing to appoint them to public office. It prevents, however, the bringing more closely together of the legislative and executive departments, and, on this account, it has been urged in some quarters that the constitution should be so amended as to allow the governor to appoint the heads of executive departments from among the members of the legislature.

Although party issues are not of great importance in the proceedings of the state legislature, nevertheless, except in two states, members are elected to that body on party tickets. Except in one state a plurality of votes is sufficient to elect to membership in either house. The result of this plan is that control of the legislature will be in the hands of the party having the largest vote, even though it may be considerably less than the majority. In order to afford representation to

minor parties who are now usually almost or entirely unrepresented, the introduction of some form of proportional representation in legislative elections has been urged, but has not yet been adopted.

In Illinois a peculiar system of electing representatives in the lower house is in use. One senator is elected from each of the fifty-one senatorial districts, and each voter has one vote in voting for a senator; but three representatives are elected from each senatorial district and each voter has three votes which he may "plump" for one candidate or distribute among the candidates for representative in such manner as he sees fit. This is known as the system of minority representation or cumulative voting provided for in the constitution of 1870 and is unique among the methods of electing legislative representatives found in the various states. At the time when that constitution was adopted the sectional feeling between the northern and southern parts of the state was so strong that almost solid Republican delegations were sent to the legislature from the northern part of the state, while almost solid Democratic delegations were sent from the southern part of the state, with the result that many Democrats in the northern part and many Republicans in the southern part were without representation. The system of minority representation was designed to remedy this condition, and it has been successful in attaining this object. Thus a study of the matter made in 1908 showed that in only three instances since 1870 had the principal minority party failed to secure at least one representative in each district, and third parties also had usually been able to secure some representation.<sup>18</sup> The representation secured by minority parties has not, of course, been exactly proportional to their numerical strength, but more nearly so than would have been possible without the system of minority representation.

The sectional issue which brought forth the system of minority representation is no longer so acute as formerly, and the system must now be judged by certain other more or less un-

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<sup>18</sup> Moore, *History of Cumulative Voting and Minority Representation in Illinois*, 93ff.



foreseen results which have arisen from it. One result has been the limitation of the number of candidates brought forward by the two leading political parties. Prior to the enactment of the direct primary law, the party leaders in caucus or convention controlled nominations and determined the number of candidates to be nominated. In most districts, the majority party nominated two candidates and the principal minority party nominated only one, while in districts which were nearly evenly divided between the two leading parties, it was a frequent practice to alternate, one party nominating two candidates at one biennial election and the other at the next. This "resulted in members of the legislature being appointed by the extra-legal government. The electorate has been wholly and palpably disfranchised. . . . Thus the voter is given no choice whatever and the nominations are an appointment. . . . Thus the electorate in very many Illinois districts has had comparatively little or no real representation in the lower house for years."<sup>19</sup> At the elections of 1902-1908 inclusive, the number of districts in which only three candidates were nominated by the two leading parties averaged thirty-six, while the number of districts in which more than three were nominated averaged fifteen. The influence of the party machine in controlling nominations and elections to the lower house, therefore, is very great.

It was expected by some that, with the enactment of the direct primary election law, the influence of the party machine would be weakened. The act, however, provides that "the Senatorial committee of each political party shall meet and by resolution, fix and determine the number of candidates to be nominated by their party at the primary for Representative in the General Assembly."<sup>20</sup> The law has thus left with the party committee the power of limiting the number of candidates. As a matter of fact, some limitation upon the number of candidates is essential to the working of the system, since, if each party nominated three bona fide candidates, the result

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<sup>19</sup> Kales, *Unpopular Government in the United States*, pp. 166, 167, note.

<sup>20</sup> *Hurd's Revised Statutes*, Chap. 40, Sect. 542.

would be that normally the majority party in each district would elect all three of its candidates. Since the enactment of the primary law, in the elections of 1912 and 1914 the number of districts in which only three candidates were nominated has shown a reduction from about thirty to about twenty. But in 1916, the two major political parties nominated only 181 men to be elected to 153 seats. This, however, has been due not so much to the primary law, which has disturbed machine rule very little, as to the growing civic consciousness and the meteoric career of a strong third party.

It cannot be said that the system of minority representation has increased the character and ability of the men elected to the house. It has been observed as a serious objection to the system that the "assembly chosen under it is apt to be a heterogeneous body in which no political party has a working majority, as has not infrequently happened and that the house is apt to be controlled by a different political party from that which is in control of the executive department, so that, in consequence of the lack of harmony between the executive and the legislature and the lack of a working majority by any party in the house, the legislative programs of the administration are frequently unrealized."<sup>21</sup> On the whole, therefore, it would seem that the system of minority representation or cumulative voting should be abolished.<sup>22</sup>

As indicated above, another method of electing members of the legislature which has sometimes been suggested for the purpose of securing the representation of minorities, is that of proportional representation. In one form, known as the Hare or single transferable vote system, it has been adopted for the

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<sup>21</sup> Garner, *Legislative Organization and Representation*, pp. 69, 70.

<sup>22</sup> This was sought to be accomplished by the proposed Constitution of 1922. By that instrument there were to continue to be 153 members in the lower house, but instead of being elected in groups of three from each of the senatorial districts, the state was to be divided into 153 representative districts, from each of which one member of the lower house was to be chosen. The proposed change might have reduced to some extent the representation of the minority party, but this tendency would have been partly offset by the introduction of the single-member districts, since the smaller the district the more chance the minority party has of securing its proportionate representation.

election of the council or commission in Cleveland and several other cities. According to this plan, the voter indicates on the ballot his first choice as well as his second, third or any other number of choices. He can have only one first choice, no matter how many representatives are to be elected, but if his ballot is not needed to elect his first choice, it is then transferred to his second choice, and so on.<sup>23</sup> This method of voting gives representation to minorities, factions, and groups. It tends, however, to reduce party responsibility, and is not well suited to a state in which practically all the voters usually divide into two major parties. The plurality system of elections may easily secure representatives elected only by a minority, but if the two-party system is strictly adhered to, the representative who receives a plurality will also have a majority of the votes cast.

Under most of the state constitutions, each house of the legislature is declared to be the judge of the election, returns, and qualifications of its members and may therefore severally hear and determine contests of election to seats in their respective bodies. The state canvassing board or the temporary presiding officers in the two houses determine temporarily who are entitled to be sworn in and seated as members. After organization, however, committees on credentials are constituted for the purpose of hearing contests for seats. In Illinois, all expenses connected with such contests were formerly borne by the state, and at nearly every session amounted to thousands of dollars. A few years ago, however, a change was made whereby the state bears the expenses only of those contestants who are successful, with the result that the number of contests brought was greatly reduced.

### Legislative Sessions and Privileges

Although formerly, in consonance with the idea of annual elections, legislative sessions were as a rule held annually, this plan is now retained in only about a half-dozen states, while all others, with one exception, have biennial sessions, begin-

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<sup>23</sup> For fuller description of proportional representation, see Appendix II.

ning usually in January of the odd years. The tendency has thus been in the direction of decreasing the frequency of regular sessions, but, at the same time, the frequency of special sessions has probably increased. In the majority of states, the length of legislative sessions is limited by constitutional provision, the limitation varying from forty days to five months. In some of these states the limitation is not absolute, but the per diem compensation of members is cut off or reduced after a certain time has expired.<sup>24</sup> The result of limitations on the length of sessions is frequently unfortunate, since it is likely to intensify the feverish haste and to increase the amount of ill-considered action which often occurs in the rush of legislative business near the close of the session.

The split session was introduced in California in 1911 and has since been copied in one or two other states. This plan provided that after remaining in session for thirty days there should be a recess of similar length. After reassembling no member is allowed to introduce more than two bills and then only with the consent of three-fourths of the members. Although bills may be acted upon in the first part of the split session, the theory is that that part will be devoted mainly to the introduction of bills and that final action will not be taken until after the recess, during which members will have an opportunity of hearing from their constituents.<sup>25</sup>

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<sup>24</sup> In Texas, if a session continues longer than sixty days, the per diem of members is reduced from \$5 to \$2 a day. In practice, however, there are few \$2 days, since as soon as the sixty day period has expired, the legislature adjourns without passing necessary appropriation bills, and the governor is then forced to call a special session. It is said that three or four special sessions in a biennium have become common. T. Finly, Jr., in *National Municipal Review*, November, 1923, p. 651. The proposed new Missouri Constitution of 1924 limits to thirty days the period during which full pay can be received in extra sessions.

<sup>25</sup> The purpose of the split session is fourfold: (1) to give members time to consider bills introduced; (2) to give the public opportunity to bring their opinion to bear on legislative projects; (3) to allow for legislative investigations into the conduct of the administration, and (4) to prevent the rushing through of measures at the close of the session. In California, although the people generally do not take full advantage of the opportunity afforded, the split session has been reasonably successful. See V. J. West's article in *National Municipal Review*, July, 1923, pp. 372, 373.

The compensation of members is either fixed at a lump sum per year or per session, or is placed on a per diem basis. In either case it amounts to a comparatively small sum so that it does not, in itself, form an inducement to qualified persons to run for legislative membership. The exact amount of the compensation is sometimes specified in the constitution and sometimes left to legislative action. In the latter case the legislature is usually prohibited from voting an increase of its own pay, and such laws do not ordinarily take effect until after a new legislature convenes. Provision is also frequently made for mileage, stationery, and other incidental expenses of legislators. Such mileage may apply not only to going and returning at the beginning and end of sessions but also for week-end trips home during the session. Formerly, passes were frequently granted to legislators by railroads. The feeling grew, however, that members could not accept such passes consistently with independence of action in performing their public duties, and the granting of such favors has now been generally prohibited by law.

Members of the legislature are usually entitled to certain privileges which do not attach to ordinary citizens. They are exempt from arrest during the session and while going to and returning from the same except for the more serious offenses.<sup>20</sup> They are sometimes also not subject to civil process during the same period. It is also usually provided that for any speech or debate in either house, they shall not be questioned in any other place. In other words, they are not to be held liable in damages for slanderous utterances made in the course of debate. The object of these provisions is to allow to members the largest freedom of speech and independence in the performance of their duties consistent with the protection of the public welfare. The privileges of membership in either house may be terminated not only by the expiration of the term for which a member was elected, but he may also be expelled by either house by a two-thirds vote of all the members elected to that house.

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<sup>20</sup> Offenses for which they may be arrested, however, sometimes include those which are not serious, under the broad interpretation of the term "breach of the peace."

If, however, after expulsion, a member is reëlected from his district, he may not ordinarily be again expelled for the same offense.

#### REFERENCES

For references, see end of next chapter.

## CHAPTER VII

### THE LEGISLATURE: POWERS AND PROCEDURE

UNDER the first state constitutions, as has been pointed out, there were few restrictions found in those instruments upon the action of the legislature, so that it was by far the most powerful organ of the state government. A history of state legislatures since that time would be concerned largely with the development of various methods of legally curtailing the very extensive power which those bodies originally possessed. Numerous restrictions upon legislative power have been placed in all recent constitutions. The more detailed such restrictions become, the more frequently the courts are called upon to exercise their power of declaring legislative acts unconstitutional. The governor is exercising more and more his power to veto legislation, and in a number of states the people have acquired the state-wide initiative and referendum on ordinary legislation. Furthermore, practically speaking, the lobby or so-called "third house" has sometimes almost usurped legislative functions. In spite of these restrictions and limitations, however, the power of the legislature is still very pervasive and far-reaching. The civil and criminal codes of the state, which vitally affect the life, property and happiness of the citizens, emanate largely from the legislature. Furthermore, from the same source are derived many important measures dealing with the organization and powers of the administrative and judicial authorities, acts providing for taxation and appropriation of public funds, laws relating to local government, and police regulations for the protection of the safety, health, morals, and welfare of the people.

#### Extent and Limits of Legislative Power

The general principle with regard to the extent of the powers of the legislature is that it has all legislative powers of the state

government which it is not prohibited by the national or state constitutions from exercising. The real meaning of this principle can only be ascertained by considering the attitude of the courts in construing constitutional limitations on legislative action. The courts frequently announce the doctrine that legislative acts are not to be declared unconstitutional unless they are clearly prohibited and the benefit of doubt is to be resolved in their favor. In actual practice, however, the courts are by no means so liberal. They frequently find implied constitutional limitations on legislative action which were probably not intended to operate as such by the framers of the constitutional provision. Thus, the constitution may direct the legislature to take certain action and this is then construed by the courts as preventing the legislature from taking other action of a somewhat similar character. For example, the constitution of Texas directed the legislature to pass a local option law, which was accordingly enacted in 1876. More recently but prior to the adoption of the Eighteenth Amendment to the Constitution of the United States, the legislature undertook to pass an act establishing state-wide prohibition of the liquor traffic. The state court declared this act unconstitutional on the ground that the provision of the constitution directing the legislature to establish local option prevented it from attempting to control the liquor traffic in any other manner.<sup>1</sup> Again, the provision of the constitution of New Hampshire authorizing the general court (by which name the legislature of that state is called) to "establish all manner of wholesome and reasonable laws" was construed by the court of that state as preventing the passage of such laws as the court deemed to be unreasonable.<sup>2</sup>

When the constitution vests legislative power in the legislature without specific exception, that body cannot delegate such power to any other body or to the people through the initiative

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<sup>1</sup> *Ex parte Myer*, 207 S. W. 100 (1918).

<sup>2</sup> *Hodge v. Manchester*, 111 Atl. 385 (1920); *American Political Science Review*, August, 1921, p. 405.

A New York statute of 1920 giving preference in the administration of the civil service laws to veterans of the World War was declared void as violating the constitutional provision giving preference to veterans of the Civil War. *Barthelmess v. Cukor*, 132 N. E. 140 (1921).



or referendum. Thus, an act of New York which purported to exempt from the operation of the one-day's-rest-in-seven law employees in such occupations as the commissioners of labor might designate, was held to be a delegation of legislative power to the commissioner in violation of the constitutional provision.<sup>3</sup> It was held, however, prior to the adoption of the Eighteenth Amendment, that the constitutional provision did not prevent the legislature from passing local option laws.<sup>4</sup>

Since executive and judicial powers are conferred upon other branches of the state government, these powers cannot ordinarily be exercised by the legislature unless express exception is made in the constitution, as in the matter of impeachment. Nevertheless, although the power of appointment is usually considered to be an executive power and some constitutions expressly forbid the legislature to exercise it, that body may appoint its own employees and may fill positions the duties attached to which have to do with the functions of the legislature, such as that of the legislative reference librarian.<sup>5</sup> Prior to the adoption of the Seventeenth Amendment in 1913 the legislature chose United States senators, and this function sometimes interfered seriously in the regular work of the legislature and sometimes resulted in lengthy deadlocks. In most states the senate still has the power of confirming many of the governor's appointments to office. In special sessions the legislature is usually limited, as far as its legislative powers are concerned, to taking action upon such matters as the governor sees fit to include in his call for the session. The other principal limitations which rest upon legislative action may be classified into those relating to (a) financial matters, (b) special legislation, and (c) legislative procedure. Before considering these, however, certain differences in the power of the two houses may be noted.

With respect to the extent of their powers, the differences between the two houses are comparatively slight. The most important power exercised by the senate which is not possessed

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<sup>3</sup> *People v. Klinck Packing Co.*, 108 N. E. 278 (1915).

<sup>4</sup> See, *e.g.*, *State v. Briggs*, 146 Pac. 261 (1915).

<sup>5</sup> *Cf. Dunbar v. Cronin*, 164 Pac. 447 (1917).

by the lower house is that of confirming many of the appointments to office made by the governor. Impeachment proceedings originate in the lower house, while the senate sits as a court for the purpose of hearing and passing upon the charges made in the house bill of accusation. Except in Oregon, where impeachment is not allowed, any civil officer of the state may ordinarily be impeached upon grounds specified in the constitution, such as high crimes, misdemeanors, or malfeasance in office. A two-thirds vote in the senate is usually necessary for conviction, which operates to remove the officer from office and to disqualify him from further service under the state. As a method of removal, impeachment is a cumbrous process and is seldom resorted to. What embodies now little more than a historic relic is the provision still found in the constitutions of some states that money bills may originate in the lower house only. Even in these states, however, such bills may be freely amended in the senate, so that this special privilege of the lower house is of little practical importance.

### Limitations on Financial Powers

Among the constitutional limitations frequently placed upon the financial powers of the legislatures are those relating to taxation, appropriations, and the incurring of indebtedness. It is provided in many states that all property which may be subject to taxation shall be taxed only under general laws, and that taxes shall be levied and collected for public purposes only. The tax rate on all property not exempt must be at a uniform rate, unless classification of property for purposes of taxation is allowed, in which case the rate must be uniform for all objects within any given class. In some states the rate of taxation for state purposes is specifically limited to a stated percentage of the assessed valuation. A similar limitation is also usually placed upon the rate of taxation levied by cities, counties, school districts, and other units of local government.

The power of the legislature to make appropriations is usually limited practically to such purposes as are considered to be of a public nature. The state is frequently prohibited from mak-

ing any donation to any individual or from subscribing to the stock of any private corporation. It is usually held, however, that the state may pay pensions and bonuses to ex-soldiers and public employees, since this is considered to be a public purpose for the encouragement of service to the state rather than a mere private benefit.<sup>6</sup> Financial aid to private or sectarian schools or religious institutions is frequently forbidden, although the property of such institutions is frequently exempted from taxation. No money may, as a rule, be appropriated to pay any claim against the state unless the subject matter is provided for by preëxisting law. Various requirements are made as to the form of appropriation bills, such as that they shall contain no other subject matter, and that each such bill shall distinctly specify the object and amount of the appropriation. By a constitutional amendment adopted in Maryland in 1916 and substantially copied in one or two other states, the legislature is prohibited from increasing the amount of the appropriation recommended in the executive budget for the executive department and administrative services and from decreasing the amount recommended for the judicial department.<sup>7</sup>

Limitations upon the power of the legislatures to incur indebtedness began to be inserted in state constitutions during the second quarter of the nineteenth century. This development was due generally to the growing distrust of legislative bodies, and specifically to the widespread extravagance of such bodies in granting state aid to various forms of internal improvement, such as canals, railroads, and turnpikes. The power thus withdrawn from the legislatures was in a number of states reserved to the voters who, by referendum, might authorize state indebtedness. In practice, however, the requirement of a popular referendum has not operated as a very effective check upon the debt-incurring power, and the aggregate amount of state indebtedness is rapidly increasing, due mainly to the movement for good roads and for soldiers' bonuses. Under certain circumstances, the legislature may incur indebtedness on its own

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<sup>6</sup> A constitutional amendment, however, was necessary in New York state in order to open the way for soldiers' bonuses.

<sup>7</sup> For further discussion of the budget, see Chap. XI.

authority without popular referendum. This may be done when the amount is comparatively small, usually less than a half million dollars, or, in cases of emergency, to suppress an insurrection or repel invasion.

In addition to general limitations on state indebtedness, constitutional prohibitions are also frequently found against the pledging of the credit of the state on behalf of private enterprises. Furthermore, the courts generally hold that taxation for a private purpose is unconstitutional and this indirectly limits the debt-incurring power, since the debt must ultimately be paid off, in most cases, through taxes. In Wisconsin it has been held that, although the state may not make donations to a private enterprise, the constitution does not prohibit the state or its municipal corporations from subscribing to the stock of such enterprises.<sup>8</sup> In most states, however, it is held that there is no real distinction between these two methods of granting state aid.<sup>9</sup>

### Special Legislation

Legislative bodies have shown themselves to be prone to pass laws of special and local application, a tendency which is probably due in part to the prevailing practice of electing legislators as representatives of local districts. In many states the volume of special and local laws was formerly much greater than that of general laws.<sup>10</sup> In order to correct this abuse most

<sup>8</sup> *Whiting v. Sheboygan Ry. Co.*, 25 Wis. 167 (1870).

<sup>9</sup> *Cf. Perry v. Keene*, 56 N. H. 514 (1876).

<sup>10</sup> The following titles of special and local bills passed at a recent session of the North Carolina legislature will illustrate the nature of such measures:

"To prevent the throwing of sawdust in Big Ivey Creek in Buncombe Co."

"To prevent the sale of malt, near-beer, and beerine in Macon Co."

"Providing that 4½ feet shall be the lawful height of fences in Perquimans Co."

"To prevent depredations by turkeys, geese, ducks, and chickens in Catawba Co."

"To prevent the shooting of firecrackers within one mile of the post-office at Haw River."

The title of another bill considered by the same legislature was "To make illegal the keeping of honey bees within 100 yards of the public

states have within recent decades adopted constitutional restrictions upon the passage of local and special laws. These restrictions are of three kinds. First, there is usually found a provision to the effect that no special law shall be passed where a general law can be made applicable. This restriction may be evaded, however, for the courts have usually held that it is directory and not mandatory, and the action of the legislature in such a case is not subject to judicial review.<sup>11</sup> In order to overcome this attitude of the courts, however, it has been specifically provided in the constitutions of a few states, such as Michigan and Missouri, that whether or not a general law could have been made applicable in any case is a question subject to judicial determination, without regard to any legislative assertion on the subject.<sup>12</sup>

In the second place, most of the state constitutions prohibit the legislature from passing local or special laws upon certain specifically enumerated matters. Thus, the constitution of Missouri enumerates thirty-two such matters, while that of Illinois mentions twenty-three. Examples of the prohibited special acts are those granting divorces, creating corporations, and regulating the affairs of particular counties or cities. As to the enumerated subjects, the prohibition against special legislation is absolute and not subject to legislative discretion, but the courts determine in each contested case as to whether or not the legislation comes within the constitutional prohibition.

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roads in Pender Co." When the bill came up for consideration it appeared that the reason for its introduction was that mail carriers had been stung by bees when attempting to collect mail from boxes. One legislator inquired as to what legal means were to be adopted to keep the bees off the roads, while another moved to amend the bill so as to include in the prohibition wasps, bumble bees, and yellow jackets. Cf. C. L. Jones, *Statute Lawmaking*, pp. 39, 40.

Massachusetts is one of the most serious offenders in the matter of special and local legislation, about half of the acts passed and a still larger percentage of bills introduced being of this character. Thus, in the session of 1923, out of a total of 494 acts passed, 235 were special. A. C. Hanford, in *National Municipal Review*, January, 1924, p. 46.

<sup>11</sup> *Wilson v. Board of Trustees et al.*, 133 Ill. 443, 446; *Knopf v. People ex rel.*, 185 Ill. 20; *Owners of Lands v. People ex rel.*, 113 Ill. 296, 315.

<sup>12</sup> Constitution of Missouri, Art. IV, Sect. 53, cl. 32.

There are, however, undoubtedly many instances of unconstitutional special laws which are not contested in the courts. The third class of constitutional restrictions upon the passage of special laws relates to the procedure to be followed by the legislature in the enactment of such measures. Thus, in New York, special or private bills appropriating money require for passage a two-thirds vote of the entire membership of each branch.<sup>13</sup> In a number of other states, such as New Jersey and Missouri, the constitutions prohibit the passage of local or special laws without prior notice to the community or locality affected.

In addition to the specific limitations upon local or special legislation found in the state constitutions, the prohibition upon the states found in the Fourteenth Amendment to the Constitution of the United States against depriving any person of the equal protection of the laws may also operate to prevent the legislature from arbitrarily enacting laws discriminating against particular corporations or individuals.<sup>14</sup> This, however, does not prevent the legislature from classifying corporations or individuals for purposes of regulation or taxation, and applying different regulations or tax rates to each class, provided the classification is based on a just and reasonable distinction.<sup>15</sup> Classification of cities may be made on the basis of population, but where only one city falls or can fall within a given group, the classification is likely to be held invalid as constituting special legislation thinly disguised.<sup>16</sup>

### Legislative Procedure

In order that the work of the legislature may be performed in regular and orderly fashion, fairly definite rules of procedure are laid down. The constitutions generally authorize each house to adopt its own rules of procedure, but this is surplusage, since any legislative body would have inherent power to make such regulations. The constitution framers, however, have not

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<sup>13</sup> Constitution of New York, Art. III, Sect. 20.

<sup>14</sup> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

<sup>15</sup> *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89.

<sup>16</sup> *State ex rel. Kinsely v. Jones*, 66 Ohio St. 453.

been willing to leave such matters entirely to legislative discretion, but have undertaken to limit the power of the legislature in this respect by laying down some rules of procedure in the constitution itself. This is merely one phase of the many evidences of lack of confidence in legislative bodies on the part of constitution framers. Thus, the constitutions in many states provide that a majority of each house shall constitute a quorum for the transaction of business. A specific form of enacting clause is usually provided for all bills, which, with the exception of money bills in some states, may originate in either house, but may be amended or rejected by the other. Other rules of procedure frequently laid down in state constitutions are: no act shall embrace more than one subject and that shall be expressed in the title; for the passage of bills an affirmative vote of a majority of all members elected to each house is required; no law shall be revived or amended by reference to its title only, but the law revived or the section amended must be inserted at length in the new act.<sup>17</sup>

A survival from English parliamentary practice is the rule still found in many constitutions requiring that each bill be read or read at length on three different days before final passage. This rule had some usefulness at a time when the printing of bills was not customary and when some members of the legislature were unable to read. At the present time, however, bills and amendments thereto are ordinarily printed and distributed to members before final passage, and even when the rule for three readings is strictly observed, members pay little attention to the readings. The rule is therefore now of little use, but may sometimes be invoked for purposes of delay and

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<sup>17</sup> This requirement has been construed by the courts of Illinois as applicable to acts independent in form as well as to those expressly amendatory. This has given rise to much uncertainty, since many acts not expressly amendatory might be construed as impliedly amendatory of some previous act. The proposed Illinois constitution of 1922 attempted to remedy this condition by limiting the requirement to acts expressly amendatory (Sect. 36).

For further consideration of this topic, see R. M. Story, "Amendment of Statutes," *American Political Science Review*, November, 1916, pp. 743-748.

53rd General Assembly  
STATE OF ILLINOIS

**SPECIAL ORDERS**  
H. B. 615—Kearns—Cures and Villages, 3rd Reading, 3rd

### SPECIAL ORDERS

## SENATE DILLS, 1st READING

77—Schulze—T. 1900  
104—T. 1900—T. 1900

## SENATE BILLS 2nd READING

335—Van Lant—Finger Point.  
171—Urmas—Exhibition Australia.  
521—Urac Cern—Hospice of Transylvania.  
346—Duching—Taxes.  
331—Communist on Revenue and Finance—Horse Racing.  
103—Tilland—Crisis in 2 villages.  
100—Cikow—Court in the Health Department.  
463—Adler—Lovers and Village.  
169—Cuthbertson—Washington.  
142—Dunlop—Moscow Village.  
674—Mills—World War Veterans.  
41—Tallent—Kampong.

## SENATE BILLS 3rd READING

[illegible]

## HOUSE BILLS, 1st READING

- 633—*Canailles on Appropriations—Grand Stairs Access*
- 637—*Lyons—Paradise Entry*
- 641—*Lyons—Landslide and Tenants*
- 643—*Waters and Canyon of the Way*
- 644—*Committee of License and Miscellaneous—Athletic Exhibitions*
- 647—*Boys—Scholarship*
- 648—*Lyons—Taverns*
- 652—*Swenson—Marriage Court*
- 653—*Boys—J. R. Ranch and Beldges*
- 658—*Bennett—Public Hospital*
- 659—*Boys, Ben and*
- 668—*Church—Reveries*
- 726—*McCluskey F. A. Tears*
- 727—*Swenson—Baldern*
- 731—*Swenson—Lindholm Tenancy*
- 824—*Committee on Appropriations—Steering*

## HOUSE BILLS, 2-1 READING

[illegible]

## HOUSE BILL 11 2-d READING—Continued

167—Hergrove—Oils and Gas Wells  
168—O Tulew—Wastelands  
169—C Williams—Chicago Sanitary District  
170—Derry—Taxes  
171—Bory—Taxes  
172—Woss—Disfranchisement  
173—Committee on Revenue—Zoological Parks  
174—O'Neill—Finest of Property  
175—Boyle—City Street  
176—Kearns—Taxes  
177—Committee on Education—Schools  
178—Committee on Appropriations—Audits of Public Accounts  
179—Thorn—Fish and Game  
180—Emmett—North-West General Assembly  
181—Hart—Elgin State Hospital  
182—Committee on Expenditures—Election Expenses  
183—Committee on Appropriations—Pay State Employees

## HOUSE BILLS, 3d READING

- 171—*Principles—Crisis of Conscience.*
- 474—*Brutality—Cruelty of the Poor.*
- 574—*Calumnies—Lies of the Press.*
- 674—*Calumnies—Investigative Commission.*
- 774—*Calumnies—Society.*
- 874—*Calumnies—Society.*
- 974—*Calumnies—Society.*
- 1074—*Calumnies—Society.*
- 1174—*Calumnies—Society.*
- 1274—*Calumnies—Society.*
- 1374—*Calumnies—Society.*
- 1474—*Calumnies—Society.*
- 1574—*Calumnies—Society.*
- 1674—*Calumnies—Society.*
- 1774—*Calumnies—Society.*
- 1874—*Calumnies—Society.*
- 1974—*Calumnies—Society.*
- 2074—*Calumnies—Society.*
- 2174—*Calumnies—Society.*
- 2274—*Calumnies—Society.*
- 2374—*Calumnies—Society.*
- 2474—*Calumnies—Society.*
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### CONSIDERATION OF RESOLUTIONS

3 J R 13—Wehrer—Federal Coordinator.  
3 J 14—Forrester—Amendment to Constitution.

### UNFINISHED BUSINESS

131-Webster-Partnerships-Name of Motion to Re-  
sinder

**EXECUTIVE MESSAGES**

Next Senate Bill No. 557  
Next Senate Resolution No. 57  
Next Senate Joint Resolution No. 22.

Appropriation bills in bold face type.



obstruction.<sup>18</sup> Recognizing this fact some constitutions allow the first and second readings to be by title only instead of at length, or to be dispensed with entirely in case of emergency.<sup>19</sup>

In spite of the old adage that ignorance of the law excuses no one, it is not deemed proper that the people should be subjected to the operation of laws of whose existence or provisions they have had no opportunity of learning. Consequently many constitutions provide either that bills shall not go into effect until a certain date or that a certain period of time, usually ninety days, shall elapse after the passage of a bill or after the adjournment of the session at which it was enacted before it shall go into effect. Exceptions are usually allowed, however, in cases of emergency. Under such circumstances the bill may go into effect immediately, but it must be designated as an emergency measure and must be passed by a two-thirds vote or other extraordinary majority.<sup>20</sup>

The above are examples but by no means an exhaustive list of rules of legislative procedure laid down in state constitutions. Within the limits of these constitutional rules, each house may adopt such further rules of procedure as it sees fit. A new set of rules is adopted by each house at the beginning of each session, but they usually differ little from those of the preceding session. Until the new set of rules is adopted, the houses proceed either under the old rules or under the general principles of parliamentary law. The rules as thus adopted have a wider scope than those laid down in the constitution, and usually

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<sup>18</sup> In one instance an attempt to use the rule for such purposes was largely frustrated through the organization of a reading squad to read several portions of the bill simultaneously. H. W. Dodds, *Procedure in State Legislatures*, Supplement to *Annals of American Academy of Political and Social Science*, May, 1918, p. 68n.

<sup>19</sup> The proposed Illinois Constitution of 1922 provided that all three readings should be by title instead of at large, unless the rules of either house required the reading of bills at greater length on second and third reading (Sect. 40).

<sup>20</sup> The proposed Illinois Constitution of 1922 provided that acts of the legislature should not take effect until sixty days after the end of the session, but excepted from this rule not only emergency measures, but also appropriation acts (Sect. 43). The latter exception was made in order to avoid a variable date for the taking effect of such acts and to provide a fixed fiscal period,

cover such matters as the introduction and reference of bills, the limitation of debate, and the operation of the committee system.

### Organization for Work

The presiding officer in the lower house is in all states the speaker, and in the upper house of most states the lieutenant-governor, elected at large by the voters, occupies this position. A few states, however, having no lieutenant-governor, the upper house chooses its own presiding officer. The speaker is technically elected by the lower house. In reality, he is usually chosen by the caucus composed of the members of the house belonging to the majority party. Sometimes the real choice is pushed one step farther back and a small group or coterie of leading members of the majority party may select the candidate of their party for speaker. This choice is then ratified by the caucus of the majority members and later ratified by the whole house.<sup>21</sup> The speaker is thus a party man and this ordinarily insures a partisan organization of the house, and a similar condition is also found in the senate. If no party has a majority, or if some members of the majority party refuse, for any reason, to act with their party caucus, a deadlock over the selection of the speaker may ensue, which may be ended through the formation of a bipartisan combination. A speaker chosen as the result of such a combination and who is not the clear choice of his party caucus is likely to be weaker than one who comes to office without obligation to minority members. This is due to the fact that the bipartisan combination is ordinarily held together by an understanding in regard to the distribution of committee chairmanships, so that the speaker does not have as free a hand in this matter as he otherwise would. Although party lines are thus drawn in the organization of both branches of the legislature, such distinctions, corresponding to national party divisions, are largely artificial. As a matter of fact, party issues are not prominent in legislative proceedings, and

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<sup>21</sup> The candidate for speaker nominated in the house caucus of the minority party ordinarily becomes the minority leader on the floor of the house.

on most of the votes taken members of each party may be found on both sides of the question.

The selection of the speaker is an important matter on account of the large powers of that officer. It is his duty to preserve order and decorum with the assistance of the sergeant-at-arms and to direct and control the officers and employees of the house. He decides points of order subject to an appeal to the house, but his decisions are seldom overruled. His most important powers, however, are those of appointing committees, referring bills to the appropriate committees and recognizing or refusing to recognize members who desire to speak. These powers enable him very largely to control the course of legislation in the house, and he thus becomes probably the most important and powerful official in the state government, next to the governor.<sup>22</sup>

The lieutenant-governor in the upper house is by no means so powerful as the speaker. He presides and decides points of order, subject to an appeal to the senate. He is not, properly speaking, a member of the senate and has no vote, except when the senate is equally divided. He sometimes has nominally the power of appointing committees, but since he is independent of the senate and might belong to the opposite party from that to which the majority of the senate belong, a number of states lodge the power of appointing committees in the senate itself or in the president pro tem, who is chosen by the senate to take the place of the lieutenant-governor when absent and in some states is looked upon as the majority leader. In the states where the senate committees are chosen by the senate itself, they are as a rule chosen upon the recommendation of a committee on committees, composed of majority leaders.

Except the lieutenant-governor, all officers and employees of the legislature are chosen by the respective houses or their presiding officers. These include secretaries, clerks, chaplains,

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<sup>22</sup> Although the speaker appoints the committees, his power is not absolute in this matter, as he is under the practical necessity of considering the wishes and susceptibilities of influential members. He also usually adopts the recommendations of the minority leader as to the minority members on committees.

sergeants-at-arms, doorkeepers, janitors, postmasters, mail carriers, policemen, stenographers, and pages. Except in Wisconsin, none of these employees are under civil service regulations and the appointments are often made as rewards for party services. There are undoubtedly, as a rule, many more legislative employees than are necessary for the work to be performed.<sup>23</sup> Sometimes acts are passed fixing the number of legislative employees, but such a statute is probably not legally binding on the legislature itself and is usually disregarded in practice. When no party has a clear majority in the legislature, the number of employees tends to be larger on account of the supposed necessity of placating the different factions by distributing among them the control over the appointment of employees.<sup>24</sup>

### Introduction and Passage of Bills

Bills may be introduced in either house by any individual member or by a standing committee. The great majority of bills are introduced by individual members, and there is thus no concentrated responsibility for proposed legislation as in parliamentary governments. One result of this plan is that the number of bills introduced is quite large. Thus, in the forty-ninth general assembly of Illinois nearly a thousand bills were introduced in the house and over five hundred in the sen-

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<sup>23</sup> In Illinois there were employed by the forty-third general assembly, 393 persons, of whom 92 were janitors, at a cost of \$110,000. At the session of 1911 in Wisconsin, where the legislative employees are under civil service regulations, the number of employees was only 88 and the cost only \$50,000.

In order to reduce expense occasioned by useless legislative employees, the proposed Missouri Constitution of 1924 provides that the total daily expense for officers and employees shall not exceed \$400 for the house and \$300 for the senate in regular sessions.

<sup>24</sup> In order to improve the efficiency of legislative employees, and the better to coördinate their work by placing them under a single administrative head, the Model State Constitution of the National Municipal League provides that the secretary of the legislature shall appoint and supervise all employees, and shall have charge of all service incidental to the work of legislation (sect. 23). This plan would probably not only increase efficiency, but also reduce expense, since, under the unicameral system, only one set of legislative employees would be required.

ate. The lack of a feeling of responsibility for bills introduced is shown especially by the frequent practice of introducing bills "by request."<sup>25</sup> Such bills, however, are seldom passed. In order to afford more adequate time for the consideration of bills, there is usually some restriction placed on the time when bills may be introduced. Such restrictions, however, may be disregarded by unanimous consent or by special permission and in practice have not proved very effective in accomplishing the object in view.

When bills are introduced they are usually given their first reading by title and referred by the presiding officer to a committee. After the bill has been reported back from the committee it is put on second reading and amendments are then generally in order. In some states debate may take place at this stage, while in others no opportunity for debate is afforded until third reading. Where the house resolves itself into the committee of the whole, greater opportunity for debate is afforded, but this plan is, in most states, seldom resorted to. Of real debate through the hammering of bills into shape by interchange of views and opinions there is comparatively little on the floor of the house. If a tendency to indulge unduly in debate obtrudes itself, means exist whereby it may be cut off. Thus, a member desiring to speak must be recognized by the presiding officer. Again, the rules usually provide a time limit on the length of individual speeches and prohibit speaking oftener than once on the same question.<sup>26</sup> Moreover, the previous question may be ordered, which has the effect of putting the main question to a vote and of bringing all debate to an end. In two or three states, including Pennsylvania and Illinois, debates are fully reported and published. The principal advantage of publishing the debates seems to be in operating

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<sup>25</sup> This practice should be prohibited. See Illinois Legislative Voters' League, *Assembly Bulletin*, November 20, 1914.

<sup>26</sup> The rule regarding limitation of time may sometimes be practically nullified. Thus, in Nebraska, in spite of the five-minute rule, a member speaking can proceed as long as he can persuade other members to grant him their time. R. S. Boots, in *National Municipal Review*, February, 1924, p. 115.

1 Introduced by Mr. Buck, April 12, 1923.

2 Read by title, ordered printed and referred to Committee on Appropriations.

## A BILL

For An Act to create a Tax Investigation Commission, to define its powers and duties and to make an appropriation therefor,

SECTION 1. *Be it enacted by the People of the State of Illinois,*  
2 *represented in the General Assembly:* That a commission is hereby created  
3 which shall be known as the Tax Investigation Commission. The Tax Invest-  
4 igation Commission shall be composed of ten members as follows: Three mem-  
5 bers of the Senate appointed by the President of the Senate; three members of  
6 the House of Representatives appointed by the Speaker; one representative  
7 from the Illinois Bankers' Association, one member from the Illinois Manufac-  
8 turers' Association, one member from the Illinois Agricultural Association,  
9 and one member from the Illinois Federation of Labor, the last four named to  
10 be jointly appointed by the President of the Senate and the Speaker of the  
11 House of Representatives of this, the Fifty-Third General Assembly acting to-  
12 gether.

Sec. 2. The Tax Investigation Commission shall meet upon the call of the  
2 member first named by the President of the Senate as its temporary chairman.

as a deterring influence upon members against indulging in unseemly or ill-considered remarks.

On the final passage of bills, most states require a roll call and a favorable vote by a majority of all members elected. The vote is recorded in the journal, and the roll call thus has the effect of putting each member on record so that his constituents may, if they so desire, find out how their representative voted. The taking of numerous roll calls would consume considerable time but, in order to speed up legislation, a shortened roll is sometimes called by unanimous consent, and, in Wisconsin and one or two other states an electric device for calling the roll has been introduced, which considerably reduces the length of time required. All bills and amendments thereto are usually required to be printed before final passage—sometimes, as in New York, a certain number of days before final passage.<sup>27</sup> After having passed one house, a bill is signed by the presiding officer and is then sent to the other house. If it also passes the other house, it is then signed by the presiding officer of that house and is sent to the governor.

### The Committee System

On account of the freedom usually accorded to each member to introduce as many bills as he wishes and the consequent large number of bills introduced, neither branch of the legislature has the time or inclination to consider, in full assembly, all such bills with any degree of care. Therefore, committees must be appointed (in the manner indicated above) for the purpose of giving more careful consideration to proposed legislation than would be possible for either branch as a whole. These committees may be either standing or special. The whole field of possible legislation is divided up into comparatively small divisions and a standing committee assigned to each. The number of divisions and committees is somewhat arbitrary. There is a decided tendency to increase unduly the number and size of committees. Thus, in the forty-eighth general assembly of Illinois, the number of standing committees of the

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<sup>27</sup> In New York, however, a special message from the governor exempts a bill from the three day rule.

house was sixty-seven and of the senate, fifty-one. In the house, the appropriations and judiciary committees each contained forty-four members. Some members of the senate were on as many as thirty different committees. These conditions are not conducive to the efficient performance of committee work. On account of conflicts in the time of committee meetings and overlapping membership, it is impossible for the legislators to attend the meetings of all the committees of which they are members, and it is often difficult to secure a quorum for committee meetings. The unwieldy size to which legislative committees have grown appears to be due in large measure to the desire of each member to recognition by being placed on as many committees as possible. The number of committees seems sometimes to be determined, not so much by the amount of work to be done, as by the number of members of the majority party who desire chairmanships.<sup>28</sup> The large size of committees renders them easily subject to the management of a few leaders and sometimes puts the real control of the work in the hands of subcommittees.

Committees naturally vary a great deal in importance. Some are overburdened with work, while others have so little to do that they seldom or never meet. Committee meetings are usually held behind closed doors, but occasionally public hearings are held on important bills at which interested persons may be present and may speak for or against the bill by permission of the committee. In Massachusetts the plan of holding public hearings on bills has been especially well developed. Although committee meetings are usually secret, the legislative rules in a number of states now require that a record of the proceedings at such meetings shall be kept. The constitutions generally require that each house shall keep a journal of its

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<sup>28</sup> In the Illinois senate in 1915, inasmuch as no party had a majority, and, therefore, all factions had to be considered in appointing committees, there were fifty-one committees, or exactly the same as the number of members of the senate. Each member was assigned one committee chairmanship.

In the California senate the number of committees is forty, the same as the number of members, and each member is assigned to one chairmanship. V. J. West, in *National Municipal Review*, July, 1923, p. 374.



proceedings, which shall be published, but since the really important proceedings and decisions take place in the committee rooms rather than on the floor of the house, some record of committee proceedings should be preserved, in order that the committee may act under a greater sense of responsibility.

The committees are theoretically mere instrumentalities of the house for enabling it more readily to accomplish its work; in reality they largely control the course of legislation, reducing the house to the function mainly of ratifying the action of the committee. The attitude of a committee, and especially of its chairman, toward the subject matter of a bill is very largely the determining factor in the fate of the bill. If the committee and its chairman, together with the speaker and the "organization," are in favor of a bill, it is ordinarily railroaded through on lubricated skids; whereas, if they are opposed to the bill it will probably in most cases never be heard from again after reference to a committee.<sup>29</sup> In order, however, to prevent to some extent complete control over the fate of bills by the committee and its chairman, certain restrictive rules have now been adopted in a number of states. These rules provide for the discharge of the committee from further consideration of the bill after a certain length of time. Instead of automatic discharge of the committee after a certain length of time, the rules in some other states provide that a majority of all the senators or representatives may recall a bill or resolution from a committee and have it placed on the calendar. This rule tends to make the house its own master by enabling a majority of all the members to control the proceedings. In order to prevent an attempt on the part of the chairman of a committee to block consideration of a bill by failing to call a meeting of the committee, it is sometimes provided that a certain percentage of the members of the committee shall have the right to call a meeting. Although these restrictive rules are aimed at the prevention of undoubted abuses which have arisen, nevertheless

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<sup>29</sup> A graphic account of the various ways in which the progress of a bill may be advanced or impeded is contained in a bulletin of the Legislative Voters' League of Illinois, reprinted in Reinsch, *Readings on American State Government*, pp. 74-79.

the smothering or chloroforming of bills in committee is not an unmitigated evil. The introduction of many useless or even harmful bills is a safety valve of popular agitation, and smothering in committee is the easiest and simplest method of ending their careers. It would consume too much time and attention to require the whole house formally to act in regard to all measures introduced.<sup>30</sup>

In Massachusetts and one or two other New England states considerable use is made of joint committees. The use of such committees represents an approach to the unicameral system, since bills are given consideration by only one committee instead of two. Such a plan has the advantage of giving greater importance to committee proceedings, which therefore are likely to attract more public interest and attention.<sup>31</sup>

Since every bill must pass the two houses in identical form in order to become law, it is necessary, in case of disagreement between the two houses over the provisions of a bill, for one house either to recede from its own amendments or to accede to those of the other house or for both houses to make some concession by way of compromise. In order to accomplish the latter purpose in case of serious disagreements, it is customary in some states for conference committees to be appointed by each house to smooth out the difference between the opposing views of the houses and to agree to report back to the houses a bill in identical form. Such committees are usually employed during the great rush of legislation near the end of the session, particularly with reference to appropriation bills, and their reports are almost universally adopted as a matter of course, since otherwise there would be little or no chance of reaching an agreement and the bill would be lost. This situation some-

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<sup>30</sup> This is the result in Massachusetts where committees are required to report on all bills referred to them. In Wisconsin, however, where committees are also required to report back all bills, the time consumed in acting on them is reduced by the use of an electric voting device.

<sup>31</sup> It might be supposed that the joint committee system would cause friction between the two houses in reference to the control of the chairmanship, and the majority of the members, but in Massachusetts, where there are thirty joint committees, there seems to be no difficulty on this score. A. C. Hanford, in *National Municipal Review*, January, 1924, p. 41.

times enables conference committees practically to legislate by slipping into the bill as reported items which had not been contained in the bill as originally passed by either house. The houses are then practically forced to accept these provisions as added by the conference committees, without proper consideration in the scramble and confusion attendant upon the closing hours of the session.<sup>32</sup>

### Working of Legislative Rules

The rules of the legislature are hardly adapted to the most efficient transaction of business, and they might be improved in various respects. There should be such order and deliberation in the proceedings as to deprive members of any excuse for voting blindly and without sufficient consideration on important measures, and some means should be adopted to prevent the great congestion of business during the last few days of the session. The introduction of bills "by request," as already indicated, should be prohibited so that each member

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<sup>32</sup> In an attempt to remedy this abuse, the proposed Illinois Constitution of 1922 provided that "no subject matter shall be included in any conference committee report on an appropriation bill unless such subject matter directly relates to matters of difference between the Houses, and has been specifically referred to the Conference Committee. No appropriation bill shall be passed, and no report of any Conference Committee on an appropriation bill shall be considered unless the bill or report has been printed in its final form, and placed on the desks of the members at least three legislative days prior to the final passage of the bill or the consideration of the report." (Sect. 39.) Although the proposed constitution was defeated, the rule was nevertheless adopted as a House rule in the session of 1923, and also as one of the joint rules governing joint action of the House and Senate. "By reason of this rule one of the most important reforms in the history of the legislature was accomplished. Its strict observance gave every member of the General Assembly ample opportunity to know the contents of all appropriation bills. Even the items of the great Omnibus bill were quite generally known to all painstaking members and were discussed on the floor of both Houses as never before. In consequence numerous items were cut out of the bill in each House and its total was substantially reduced. The fact that the rule was in force also made the members of the Appropriations Committee much more careful than they would have been if they had not been aware that their work would be subjected to careful scrutiny." Legislative Voters' League of Illinois, *Assembly Bulletin*, January, 1924, p. 45.

may take the responsibility for his own bills. In a legislative body where there are many new members, it is almost inevitable that large powers over the course of legislation should gravitate into the hands of a small group of leaders.<sup>33</sup> The house rules committee and the senate executive committee may become very powerful in deciding the course of legislation in their respective houses. There is also sometimes found a steering or sifting committee which exercises important powers in virtually determining the fate of bills, particularly towards the close of the session when the great rush of legislation occurs. Any party, faction, or group may have a steering committee, either self-constituted, chosen by its own members, or appointed by the speaker or by the chairman of the party caucus. The legislative caucuses and steering committees represent tendencies toward concentration of party control and responsibility.<sup>34</sup> The fact that the chairmen of all committees usually belong to the majority party also tends in the same direction. Party responsibility in the legislature, however, is not very strong and comparatively few of the votes in that body are taken on strictly party lines. On important issues, however, party caucuses are usually held to determine party policy, although occasionally some members of the party refuse to attend or to be bound by the caucus. It sometimes happens that real control of the course of legislation is in the hands of a bipartisan combination, composed of the organization members of the two major parties.

Some means should be adopted, if possible, whereby such large powers may rest in the hands of those who can be held effectually responsible for their proper exercise. One of the most crying needs of state legislatures today is responsible

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<sup>33</sup> Thus, in Massachusetts, "The principal leaders in the house are the speaker, the floor leader, who serves on the rules committee, the chairman of the committee on ways and means, the chairman of the committee on judiciary, and a half-dozen others who gain prominence because of ability and personality." A. C. Hanford, in *National Municipal Review*, January, 1924, p. 45.

<sup>34</sup> In California, however, the legislature is not organized on party lines as in other states. V. J. West, in *National Municipal Review*, July, 1923, p. 373.

leadership. On account of the disintegration of political parties in some states, there is little to be looked for from party organizations and caucuses.<sup>35</sup> The governor may sometimes assume a position of leadership, but this is not always forthcoming and may be regarded by some legislators as usurpation. The unofficial boss, who stands behind the scenes and pulls the wires, making many legislators into mere puppets, may supply leadership of a certain sort. But there has been widespread revolt against this kind of irresponsible, invisible government. A more responsible form of leadership must be substituted for that of the "boss"; but leadership there must be, or the legislature will drift like a rudderless ship. A promising move in this connection is the suggestion for the creation of a legislative council, to be composed of the governor and a few members of a unicameral legislature, and to act as a continuous body in guiding the course of legislation.<sup>36</sup>

Even though the legislative rules were perfected so as to be entirely unobjectionable, it would still remain true that there would be no assurance that they would be observed, if it should be to the interest of the various factions and members generally to disregard them. These rules may at all times be suspended by unanimous consent, and this is frequently done. It may happen that, even though a member may disapprove of the irregularity of the proceedings, he hesitates to raise an objection and thereby endanger his own usefulness as a legislator by rendering himself obnoxious to the leaders and other members whose consent he must obtain in order to get his own measures through. When the irregularity of the proceedings becomes so flagrant, however, that a member or members raise objections, their objections may be ignored if the presiding officer and the "organization" are determined to brook no opposition, and the measure may be carried by "gavel

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<sup>35</sup> Thus, in Wisconsin, it is said that, "with the exception of the Socialists, there is no party organization, and no recognized party leadership within the legislature." W. Thompson, in *National Municipal Review*, October, 1923, p. 607.

<sup>36</sup> See the Model State Constitution of the National Municipal League, Sects. 29-31.

rule."<sup>37</sup> Such methods, when designed merely to prevent the dilatory tactics of the minority, may not be wholly objectionable, but when used to deprive either the majority or the minority of their constitutional rights, are highly censurable.

Although the houses cannot be compelled by any outside authority to observe the rules adopted by themselves, the disregard of rules of legislative procedure laid down in the constitution rests upon a somewhat different basis. A bill which bears the signatures of the presiding officers of both houses and of the governor will be presumed to have become a law pursuant to the requirements of the constitution; but, in many states this presumption will be overcome if the journal fails to show that the act was passed in the mode prescribed by the constitution.<sup>38</sup> It sometimes happens, however, that constitutional requirements are disregarded by unanimous consent and the question of the validity of the passage of the bill is never raised in the courts. A constitutional requirement which is often waived by unanimous consent is that providing that every bill shall be read at length on three different days. To comply literally with this requirement would consume so much time

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<sup>37</sup> One of the most notorious attempts to gavel through a measure occurred in Illinois in 1903, when the speaker ignored repeated cries for a roll call during the fight over a traction bill, and was finally forced to leave his chair by the rush of indignant members. A resolution protesting against the conduct of the speaker was unanimously adopted at a meeting of ninety-seven house members, and ordered spread upon the journal. The preamble of the resolution recited that "the speaker of this house has by revolutionary and unconstitutional methods denied a hearing in this house or a roll call constitutionally demanded upon measures of grave importance, and has attempted by the same methods to force the same beyond the point where they can be amended or calmly considered by this house upon their merits." (*Illinois House Journal*, 1903, p. 833). Again, in 1913, in the same state, the speaker refused to grant a roll call when demanded by the number of members required by the constitution, and gavelled through a resolution providing for the appointment of a number of additional legislative employees.

<sup>38</sup> See *Neiberger v. McCullough*, 253 Ill. 312; *McAuliffe v. O'Connell*, 258 Ill. 186; *People ex rel. v. Brady*, 262 Ill. 578. In some states, the constitutional requirements have been held to be mandatory on the legislature, and in others merely directory. See H. W. Dodds' "Procedure in State Legislatures," Supplement to *Annals of the American Academy of Political and Social Science*, May, 1918, pp. 10, 11, and cases there cited.

that little progress could be made.<sup>39</sup> Moreover, even though constitutional requirements are not actually complied with and the question of the validity of the act is raised in the courts, if no irregularity is disclosed on the face of the bill nor on that of the journal, the courts will not, as a rule, go behind the face of the official record. Inasmuch as the proceedings are recorded by the clerk in accordance with the decisions of the presiding officer, it may result, as has been said, that "what the speaker declares the clerk must record, and what the clerk records no court will set aside."<sup>40</sup>

As to the character of the legislative output, the quantity is more imposing than the quality. The lack of system and concentrated responsibility are indicated by the fact that sometimes conflicting measures relating to the same subject are passed at the same session.<sup>41</sup> The scramble, haste and confusion amid which bills are amended, reported, passed, sent to conference, and repassed, especially in the closing hours of a session, are responsible for the passage of much ill-considered legislation as well as for the killing or smothering of many meritorious bills. It is particularly in the field of financial legislation that more systematic methods and concentrated responsibility seem to be needed. Total state appropriations in recent years have mounted at a rapid rate. Appropriations for state institutions are frequently passed without adequate information on the part of the legislature as to their needs. Committees of legislators are sometimes appointed to visit the various state institutions with the ostensible purpose of in-

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<sup>39</sup> Few, if any, members of the legislature would be inclined to insist on literal compliance with this provision in the case of such a bill as the Gilbert court practice bill in the forty-seventh general assembly of Illinois, which contained fifteen hundred printed pages and was calculated to require about sixty-five hours to read in full.

<sup>40</sup> Bulletin of the Legislative Voters' League of Illinois, 1903, quoted in Reinsch, *Readings on American State Government*, p. 75.

<sup>41</sup> Thus, in the forty-seventh general assembly of Illinois, two acts were passed, the state civil service law, and the state mining law, which contained provisions relative to the appointment of state mine inspectors that were in irreconcilable conflict. (*Report of the Attorney-General of Illinois*, 1912, p. 1073.) For additional instances of confusing and contradictory legislation, see *Proceedings of the Illinois State Bar Association*, 1897, Part 2, pp. 3-5.

quiring into their financial needs, but such visiting committees seldom succeed in eliciting information of much real value, and, in some cases, seem even to have degenerated into legislative junkets. Even though the legislature did its full duty to the best of its ability, it is not usually as well suited as the head of the executive department to originate the state-wide financial program. The rapid increase in the expense of running the state governments has naturally drawn attention to the unsystematic and haphazard methods of financial legislation and has caused a movement toward bringing about an improvement in this direction through the establishment of the executive budget system.<sup>42</sup>

The quality of legislation could doubtless be much improved if means were adopted whereby each bill could be given adequate and unhurried examination. It is impossible for the majority of the legislators to give such examination during the end-of-the-session rush. This rush is due in some states, at least in part, to constitutional limitations upon the length of the session, but it occurs also to some extent even in states having no such limitation. In part, this situation is due to intentional manipulation on the part of organization leaders or committee chairmen, who may expect that their bills will have a better chance of passage if they are not too carefully scrutinized. Action on other bills is sometimes delayed until, through the process of "logrolling" and "back-scratching," sufficient support is secured for the organization measures.

To illustrate how legislation is crowded into the end of the session, the New Jersey legislative session of 1923 lasted eleven weeks, during which time 253 bills were passed, of which 217 were passed during the last three weeks. The Illinois session of 1923 lasted over five months and passed 380 bills, of which 295 were passed during the last week.<sup>43</sup> This situation might be remedied to some extent by more responsible and capable

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<sup>42</sup> On this topic, see Chap. XI.

<sup>43</sup> In the 1921 session of the same legislature, of 361 bills passed altogether, 315 were passed during the last 72 hours. S. M. Singleton, in *American Political Science Review*, November, 1921, p. 583. See also L. D. White, in *National Municipal Review*, December, 1923, pp. 712-719.



leadership, and by stricter adherence to such rules as those requiring the introduction of all bills during the early part of the session, and requiring committees to report on all bills on or before a date well in advance of the end of the session. Such rules are observed in the Massachusetts legislature with the result that the last minute rush is effectively avoided.<sup>44</sup>

### Forces Influencing Legislation

With a view to bringing about some improvement in legislation and of creating a permanent agency to assist the legislature in this respect, legislative reference bureaus have now been established in a considerable number of states. The functions usually performed by such bureaus consist in the gathering of information and making it available for the use of the legislature, and in assisting any member thereof in the drafting of any bills or resolutions which he may desire to introduce. Information regarding the working of laws in other states may enable the legislature to copy measures that have proved successful and to avoid enacting faulty or defective legislation. Assistance in bill drafting, if rendered by competent draftsmen, is of considerable value, especially to new members, who are usually unskilled in the technical legal requirements of bill-drafting. Release from attending to such technical details allows the members more time for considering questions of general legislative policy.

The governor, through his messages, and other officers of the executive department, through supplying information, may exert an influence upon the course of legislation. The governor may also bring pressure to bear upon legislators through his power of patronage. He may appeal over the heads of the legislators directly to the people. In furtherance of his legislative program he may send for prominent members of the legislature, particularly chairmen of important committees, and urge them to vote for the bills embodying the program to which the administration is pledged. He may even appear in committee rooms and at legislative hearings in order to discuss in

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<sup>44</sup> A. C. Hanford, in *National Municipal Review*, January, 1924, pp. 43, 44.

person questions of public policy and to advocate measures that he deems public opinion demands. He may, either through his legal power or extra-legally, suggest amendments to pending legislation.<sup>45</sup> Thus the personal influence of the governor over the course of legislation is actively and constantly exerted.<sup>46</sup>

The forces influencing legislation are of a mixed character, sometimes sinister, sometimes public-spirited. Professional lobbyists representing powerful special interests are often very numerous and active. They have sometimes waxed so powerful as almost to justify the name of "third house," sometimes applied to them. "Lame-ducks," or members who have failed of reelection, are frequently employed as lobbyists and by their experience are able to make themselves useful to new members. Formerly railroads and public utilities frequently maintained powerful lobbies and were able to secure valuable privileges. Their efforts are now directed, however, more towards preventing the passage of hostile bills, many of which, known as "strikes," "holdups," or "sandbaggers," are not really intended or expected to become laws. Actual bribery of legislators or purchase of votes with money is probably now a very rare occurrence. The withdrawal from the legislatures of the power of electing United States senators has removed one important source of possible corruption. A form of influence formerly indulged in by railroads was the grant to legislators of free

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<sup>45</sup> Thus, the governor of Wisconsin in 1915 suggested an amendment to the jitney bus regulation bill, which was embodied in the final draft.

<sup>46</sup> An attempt to confer upon the governor greater and more positive control over legislation, to give him some assurance that measures which he recommends will be given fair consideration, as well as to place upon him the responsibility of having a legislative program, was made in Illinois in 1913, when a rule was adopted in the lower house providing that "when any bill or resolution is introduced for the purpose of carrying into effect any recommendation of the governor, it may by executive message addressed to the speaker of the house be made an administration measure," and "may be sent to the appropriate committee or . . . to committee of the whole house," and, when reported out, "shall have precedence in the consideration of the house over all other measures except appropriation bills" *Illinois House Journal*, 1913, p. 315; M. D. Hull, "Legislative Procedure," *American Political Science Review*, May, 1913, pp. 239-241. This rule, however, was little used and was afterwards dropped from the rules of the house.

railroad passes, but this practice has now been generally eliminated.<sup>47</sup> In various states somewhat halfhearted attempts to prevent lobbying have been made through the adoption by each house of rules restricting access to the floor of any person not a member or employee, with the exception of certain privileged classes not acting as attorneys for persons or corporations interested in pending legislation. In some states laws have also been passed requiring lobbyists to register with a designated official, to give their names and the names of the corporation or interest represented, and, at the end of the session, to file a statement of their expenses. No serious attempt, however, is usually made to enforce these laws or legislative rules.<sup>48</sup> Nevertheless, the lobby, in its more sinister aspect, is probably less influential at present than it was a few years ago.

Although professional lobbyists usually exert a pernicious influence on legislation, it is of course true that lobbying of a certain kind is perfectly legitimate. As already indicated, the legislature frequently holds public hearings on important bills

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<sup>47</sup> Prior to 1915, the members of the Illinois legislature were accustomed to make week-end trips to their home towns at the expense of the railroads, which granted them passes. The feeling grew, however, that the members could not accept passes from the railroads consistently with independence of action in performing their legislative duties. Nevertheless, bills which were introduced at various sessions to prohibit the granting and acceptance of passes failed to be enacted into law. In the session of 1913, provisions for an increase of legislative salaries, and the abolition of railroad passes were combined in one bill, but it failed of passage. In the same session, however, the bill regulating public utilities was enacted, one section of which prohibited any public utility from granting any preference or advantage to any corporation or person as to rates or charges, or in any other respect. In this indirect way, railroad passes for legislators were abolished. In states in which railroad passes were not abolished by state action, they were abolished by the Federal Government during the World War, when the railroads were under the control of the Federal Railroad Administration.

<sup>48</sup> In Missouri, where such a law existed, only five lobbyists registered at a recent session. Nevertheless, it was said that they swarmed over the floor to such an extent that the sergeant-at-arms was repeatedly required to drive them beyond the rail. In California, the lobbyists work openly on the floor, but this is deemed better than if lobbying were carried on more secretly. V. J. West, in *National Municipal Review*, July, 1923, pp. 375, 376.

and at such hearings it is entirely proper for any citizen to appear and present his views on pending legislation, either on his own behalf or on that of the organization which he represents. Much legislation of the present day relates to technical matters about which members of the legislature may not be as well informed as certain persons on the outside, and the views of such persons are therefore of value in enabling the legislators to pass more intelligently on pending bills. Various voluntary organizations and agencies, such as citizens' unions and civic federations, are active in proposing new laws or changes in existing laws and have been of value in improving the character of the legislative product.<sup>40</sup> Much legislation is undoubtedly the outcome or resultant of pressure exerted directly on the legislature by self-conscious, specialized interests and organizations.

It is doubtless true that, within recent decades, the confidence of the people in the legislative bodies has been at a low ebb, as indicated by the numerous limitations placed on the legislatures in the state constitutions. Many incidents and much legislation may also be cited which seem to justify to some extent this lack of confidence. Such instances, however, should not be allowed to obscure the really good and substantial work which the legislatures are accomplishing in many lines in spite of the very considerable difficulties under which they operate. Their release from such difficulties and restrictions would probably enable them to do still better work.

### Legislative Reform

In spite of the good work which the legislature sometimes performs, and entirely aside from its natural and unavoidable weaknesses, there is little doubt that its organization and methods are defective in a number of respects. It is enveloped in a cloud which the searchlight of public opinion can often scarcely penetrate; its organization and procedure are so complicated as to afford little definite lodgment

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<sup>40</sup> The Legislative Voters' League of Illinois has been of great service in exposing legislative methods to public view, and in publishing the records of legislators for the information of voters.

for the salutary rays of publicity. It cannot be expected that the legislature will be efficient unless it is so reorganized that able men are drawn to its membership and given larger powers both individually and collectively, nor can it be expected to act under a sense of public responsibility unless its organization and methods of procedure are so simplified as to attract the interest and intelligent attention of the mass of the people.

Light upon the nature of the means calculated to accomplish such a reform of our state legislatures may be drawn from the history of reform in the organization of municipal councils. Our cities were at one time characterized by Mr. Bryce as America's greatest failure in government. Such fruitful efforts, however, have been put forth in recent years towards the improvement of municipal conditions that the states now possess that unenviable distinction and must now look to the cities as pointing the way of reform.

The advantages of the unicameral legislature have been spoken of above. The unicameral system has now replaced the bicameral in most of the principal cities of the country. A step which would not be so radical as the introduction of the unicameral system would be to effect a change in the co-ordinate position of the two houses by making one of them subordinate to the other in some such fashion as the House of Lords in Great Britain has been made subordinate to the House of Commons. The reason which operated in that case, however, for subordinating one branch does not exist in the case of the state legislatures. In the latter case, however, a differentiation of function might be effected between the two houses, as by giving one house the sole power of introducing bills and the other house the sole power of passing them. This would promote a concentration of attention by each house upon its special function.

Turning again to the progress of reform in the cities, we find that the old system of electing members of the city council by wards has in many instances been replaced by a system of election at large without regard to ward lines. This change has tended to secure better men in the council, men who have been able to see beyond the confines of the petty

district of the city in which they live, and have been more free to act for the general interests of the whole city. It must be admitted, however, that the city is more of a unit, both geographically and socially, than the state, and it does not, therefore, necessarily follow that the election at large of the members of the unicameral state legislature would have equally good results. The greater diversity of interests and conditions in a state doubtless make local representation a less undesirable element in the organization of the state legislature than in that of the city council. Nevertheless, if the position of members of the legislature should depend upon the suffrages of the whole mass of voters in the state, abler men could in all probability be elected and they would feel more free to act for the general interest and find larger opportunity for working for the promotion of the general welfare. Each legislator would represent the people of the whole state and the eyes of the voters of the state would be upon each member, thus increasing many fold his sense of responsibility.

In order to reconcile these opposing considerations, a compromise might be arranged, either by enlarging the districts or by electing some of the members of the legislature by districts and others on a general ticket, or by dividing the state into districts and requiring the members elected from each district to be a resident of that district, but to be elected by the votes of the people of the whole state. Any of these arrangements would tend to combine the advantages and eliminate the evils of both the district and general ticket plans. The main motive for gerrymandering the state would be to some extent taken away, the general interests would probably be more carefully safeguarded than at present, while adequate provision would still be made for the representation of legitimate local interests.

The third important municipal reform which we may consider in its bearing upon the reorganization of state government is that known as the commission form of government. The success which this form has attained in many cities has naturally given rise to the question as to the feasibility of its application to states. The recommendation of former Governor

Hodges of Kansas has brought it into prominence. His proposal, however, is not, strictly speaking, for the commission form of government in the states. He recommends that two members of the legislature be elected from each Congressional district in the state to form the single-chambered legislature, and that the governor shall be *ex officio* a member and presiding officer of this assembly. This suggested reform follows in main outline the proposed constitutional amendment submitted to the voters of Oregon, but rejected by them. This was a plan to abolish the state senate, and to give the governor membership in the house, with the power of introducing all appropriation bills. Both of these plans bring the legislative and executive branches of the government into closer contact. They disregard the somewhat discredited principle of the separation of powers, and increase the control of the governor over legislation.

The size of the unicameral legislature over which, under these plans, the governor would preside, would, of course, depend, to some extent, upon the size and population of the state. The districts, however, should be made sufficiently large so that the legislature would not be cumbrous in action, nor require elaborate and complex rules of procedure. The smaller the body, the more intelligible is its procedure likely to be, the less opportunity for the manipulations of the political tactician, and the greater the sense of responsibility which rests upon each individual member.

In the commission form of government as found in cities both executive and legislative powers are lodged in the hands of the same body. It is doubtful, however, whether it would be expedient to apply this feature without modification to the state governments. The danger of intrusting the appropriating and spending powers to a single body would probably be greater in the case of the states. Furthermore, if the governor has no important functions separate from those of the commission, his identity would probably be merged in with the commission and the state government, like a pyramid without an apex, would lack a responsible head. To avoid, therefore, this disadvantage of what may be called the pure commission form of government,

the governor alone should be at the head of the state administration, while at the same time holding his seat in the small unicameral legislature.

The latest reform of city governmental organization is the introduction of the manager or commission-manager form, whereby the voters elect a council or commission, which in turn appoints the city manager. There has been doubt in some quarters as to whether this plan of organization is applicable to large cities, and similar doubts might be entertained as to its application to states. It has now been adopted, however, in Cleveland, a city of over 800,000 inhabitants, which is larger than the population of several of the smaller states. This form of organization, as applied to the states, would have some undoubted advantages, among the most important of which would be the simplification of governmental machinery. It might be objectionable, however, as making the governor or state manager too much of an administrative chief, and not enough of a political leader. The manager plan, as applied to the states, would of course be a very considerable departure from the traditional principle of separation of powers and independence of the executive.

Another possible legislative reform might be brought about through the introduction of proportional representation in the election of members. This could be worked out by having a unicameral legislature, or, if the bicameral system is retained, by applying proportional representation to the election of the members of at least one of the branches. For this purpose, an average sized state might be divided into six or eight electoral districts from which to elect a legislative body of fifty to seventy-five members. The system of proportional representation with the single transferable vote would allow for the representation of minorities, but, on the other hand, it would be objectionable in that it would probably tend to reduce party leadership and responsibility. A legislative body exists, not merely to reflect all shades of public opinion, but also to carry out the will of the state in legislative accomplishment, and this will, in case of disagreement, should be the will of the majority. In order to carry through legislative policies under the system of propor-



tional representation, coalition of diverse groups would often be necessary. If, however, through party disintegration from other causes, the two-party system no longer exists, proportional representation is not objectionable from this standpoint. Proportional representation has not yet been applied to the state governments, but if it is to be introduced at all, it can be applied in any satisfactory manner to the legislative branch only, and not to the executive. An application so limited, however, may lead to a lack of political harmony between the legislative and executive departments.

One of the most promising of recent proposals for the reform of the legislature is that put forward by the National Municipal League. It embodies some of the suggestions made above, such as that there should be a unicameral body, elected by the system of proportional representation with the single transferable vote, and that the governor and the heads of executive departments should have seats therein, with power to introduce bills and take part in the discussion of measures.<sup>50</sup> Its distinctive feature, however, is the creation of a legislative council composed of the governor and seven members chosen by and from the legislature in accordance with the system of proportional representation with the single transferable vote. The council is to be a continuous body with power to make investigations, collect information, and make recommendations to the legislature in the form of bills or otherwise. The weak point of the plan is that the respective spheres of operation of the legislative council and of the heads of executive departments sitting in the legislature are not clearly defined. Both of these bodies are designed to bring about a closer approach to the parliamentary form of government without breaking down the principle of separation of departments altogether. Neither of them, however, quite occupies the same position as the cabinet in that form of government.

The plan, however, has certain decided merits. It assumes that the legislature as a whole must continue to be composed of amateurs and not experts. It aims to supply an agency for

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<sup>50</sup> The Model State Constitution, prepared by the Committee on State Government of the National Municipal League, Sects. 13-32, 47.

guidance and leadership which is now largely lacking in legislative chambers. It must be remembered that the process of legislation is a complicated one. It consists partly in determining upon the aim to be accomplished, and then of selecting the means whereby this aim may be attained. Next, a bill to accomplish the aim through these means must be drafted, and, finally, the draft must be approved or rejected. This last function is the only one which the legislative body of amateurs, taken as a whole, is fully competent to perform. For the performance of the functions preliminary to the final acceptance or rejection of the legislative project, it requires assistance and guidance, which may be furnished by various agencies, such as the governor, the heads of executive departments, the lobby, the legislative reference bureau, its own committees, and such a body as the proposed legislative council. This body, if created, would also doubtless exercise commanding influence in connection with the last stage of legislation. It would stand out in the minds of the people as the body in which both legislative power and responsibility are largely centered.

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## CHAPTER VIII

### THE STATE EXECUTIVE

OF the principal variations of the American type of governmental executive, the governor takes priority over the others in two important respects. In the first place, the governor was the original form of executive found in America. The first holder of this office was Lord Delaware, of Virginia, who was made governor of that colony under the charter of 1609, ten years before the first representative assembly, nearly eighty years before the first city charter and one hundred and eighty years before the first president was inaugurated. The evolution of the office of governor has proceeded without serious interruption from that date to the present. In the second place, partly on account of its priority in time, the office of governor has played an important rôle in serving in part as a model for the formation of the other principal kinds of American executive authority. The present position of the state governor is a noteworthy example of the influence of past conditions and of the past state of public feeling upon the character of present political organization.

#### The Governor: Election, Term, and Compensation

The tendency to withdraw the selection of the governor from the legislature and transfer it to the people has now become complete, so that in every state the chief magistrate is elected by popular vote.<sup>1</sup> The qualifications required of those who cast their ballots for this office are the same as those required of voters for members of the state legislature. The election of the governor, as well as of the other state officers who are elected on the same ballot, usually takes place at the same time as the election of members of the state legislature, and also of members

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<sup>1</sup> This election is direct in all the states except Mississippi, where, in form, it is indirect.

of Congress and of the President of the United States. There is no inherent impropriety in the election of the governor at the same time with the state legislature because the issues involved are for the most part the same and the governor is, in part, a political officer. If the governor were merely an administrative officer with ministerial powers, he should not be elected by popular vote at all, and if so elected, the election should be quite separate from that for members of the political department of the government. The effect of electing the governor at the same time with members of the state legislature is usually that the governor and legislature are of the same political complexion. A new governor, however, has little time to prepare a legislative program before the legislature meets.

In the case of the election of the President and national legislature, however, the issues involved are generally quite different, and the merging of state and national elections into one is apt to cause a confusion of the public mind which tends to prevent an effective popular control. Governors have sometimes been elected, not so much on their own merits or on the merits of the policies which they advocated, as because they were members of the political party which, for the time being, was dominant in national affairs. The merging of the state and national elections tends to strengthen party control and to facilitate straight party voting. In their campaign speeches, candidates for governor frequently allude in glowing terms to the principles, platform, and candidate for president of the national party with which they are affiliated and endeavor to attach their political fortunes to those of the national candidates. The tendency of the voters to vote a straight party ticket renders it easier for the candidate for governor thus to confuse the issue. But the plan of combining national and state elections has the advantage of reducing the number and expense of elections.

In most of the states a majority of all the votes cast at the election is not required to elect the governor, but a plurality of the votes is sufficient. A governor may thus sometimes be elected by a minority of the voters, and so the fundamental principle of majority rule may be violated. A few states still

require that the successful candidate shall have a majority of the total vote. If no candidate has a majority in these states, the legislature in joint ballot elects the governor. In the other states, the constitutions usually provide that if the two candidates having the highest vote are tied, the legislature, by joint ballot, shall choose one of them for governor.

Legal qualifications for the office of governor are generally laid down in the state constitutions. In a few states he need possess only the qualifications of an elector, but in most states additional requirements are made, such as that he shall have attained a certain age, usually thirty years; that he shall have been a citizen of the United States for a certain number of years, varying from two to twenty; and shall have been a resident of the state in which he is elected for a number of years, usually five. In addition the candidates must usually have been nominated in the primaries. The introduction of the method of nominating candidates for governor through primary elections has tended somewhat to increase the number of candidates and increased the opportunities of independents. Candidates, however, who have the backing of a party organization and who are able to spend money liberally still have the advantage under the primary system.

The placing in the constitutions of qualifications for the chief executive office in excess of those required of voters or of holders of other offices is an indication of the thought in the mind of the constituent body that the office is, or at least should be, one of some dignity. The object and effect, however, of requiring such qualifications as age, residence and citizenship is not only to secure in the gubernatorial chair a man of experience and knowledge of the conditions with which he will have to deal, but also to enable the people of the state the better to know him and to become acquainted with his suitability for the office, and thus to exercise a more intelligent choice in his selection. The placing in the constitution, however, of qualifications for the governor's office is legally a self-imposed limitation upon the power of the people to elect whom they will. Nevertheless, such constitutional limitations are not likely often to be of much practical importance, for, even though such

qualifications were not required by the constitution, persons not possessing them would seldom be elected. In practice, it is ordinarily necessary that a man's name should have come prominently and favorably to the notice of the people in connection with the holding of some other public office before he would be considered suitable gubernatorial timber.

The governor's term of office has been gradually increased. Although the states are about equally divided between the two-year and the four-year period, the present tendency is towards the longer period. The old idea of rotation, or of handing around the office, is thus gradually giving way to the principle that the governor should have a term long enough for him to learn thoroughly the duties of his office and for the state to reap the advantages of his experience.

Upon the same principle is based the gradual disappearance of provisions rendering the governor ineligible to succeed himself, though restrictions upon reëligibility are still found in a few states. The disappearance of these provisions is coupled with an actual tendency towards reëlection, especially in the states having the shorter terms. The restrictions upon reëligibility were originally placed in the constitutions on account of the fear that otherwise the governor might, soon after his inauguration, begin to scheme and electioneer, to form log-rolling combinations of interests and make appointments favorable to the political powers, in order to pave the way for his reëlection. These schemes, it was feared, would so distract his attention as to divert it from the proper consideration of his legitimate official duties.<sup>2</sup> Undoubtedly there was and is some force in this view, but, on the other hand, it may be urged that, when the governor is rendered ineligible to succeed himself, one of the principal incentives to perform his duties in an able and acceptable manner is taken away from him. Furthermore, the people of a state ought not to be deprived of the services of one who has proved himself to be an able, experienced and courageous governor, even though he has just had one or two terms in the office. The question really depends for its solution upon

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<sup>2</sup> See speech of Mr. Medill in the *Illinois Constitutional Convention of 1870, Debates and Proceedings*, I, p. 756.

the further question as to whether the manner of electing the governor is such as to secure a real choice by the people, or whether in reality his nomination and election are dictated by political managers or powers unfriendly to the public interests. In the former case, there is little practical need for restrictions on reëligibility.

The same considerations which brought about the placing of restrictions upon reëligibility also caused the insertion of provisions disabling the governor from serving in any other state or Federal office during the term for which he is elected. Such provisions are still found in a number of state constitutions. The courts, however, have held that such a provision does not prevent the governor from serving *ex officio* as a member of a state board, such as a state board of control,<sup>3</sup> or a state board of public works.<sup>4</sup>

In the early history of the states, the amount of the governor's salary was left to the determination of the legislature, and the latter body sometimes threatened to, and occasionally did, use this power either for the purpose of bribery or of intimidation. In the later revisions of state constitutions, the amount of the governor's salary frequently was definitely fixed in that instrument in order to make him more independent of legislative control. That the governor should be independent of the legislature in this respect, there can be little question, but the policy of definitely fixing the amount in the constitution is open to question. The amount having once been fixed in the constitution is not easily changed, even though it may have become manifestly inadequate, through the increased supply of gold and other causes which contribute to the increased cost of living. If this is the case, the governor may have to serve at a financial sacrifice, or else the constitutional provisions may be disregarded. In view of the difficulties thus disclosed, most of the states now leave the exact amount of the governor's salary to legislative discretion, but provide in the constitution that the amount shall not be increased nor diminished during his continuance in office. To this provision is also often added the

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<sup>3</sup> State *v.* Potterfield, 47 S. C. 75 (1896).

<sup>4</sup> Bridges *v.* Shallcross, 6 W. Va. 562 (1873).



further provision that the governor shall not receive to his own use any fees, perquisites, or other compensation.<sup>5</sup>

The office of governor may become vacant during the term of an incumbent in various ways, such as through impeachment by the legislature, recall by the voters, absence from the state,<sup>6</sup> or other disability. Cases might occur where the disability of the governor would be a matter of doubt, such as in cases of alleged insanity of a mild sort, but no special method is provided in the constitutions for the determination of such a question. Such a question, however, could doubtless be determined by the proper court, upon a writ of quo warranto, when the person, designated by law as the governor's successor in case of disability, should attempt to take possession of the office. This method, however, would probably not prove to be the most expeditious method of settling the matter. In case of a vacancy in the governor's office, a particular officer is designated by the constitution or statute as his successor to fill out the remainder of the unexpired term. In most states this officer is the lieutenant-governor, and, if the latter officer should in turn become incapacitated, the president of the senate and speaker of the house usually succeed in order. These officers usually succeed immediately after the governor in those states where there is no lieutenant-governor.

### The Governor's Legislative Powers

Although the governor is nominally the chief executive authority in the state government, he nevertheless participates in both of the two main functions of government, *vis.*, the formulation and the execution of public policy, and, as will be seen later, his influence in connection with the former function is frequently of even greater importance than with the latter. The laying down of general rules and the determination of broad general questions of public policy rests, in legal contemplation, primarily with the legislative body, within the limits of the constitution. As a matter of practical politics, however, and, to

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<sup>5</sup> See, for example of such a provision, Illinois Constitution, Art. V, Sect. 23.

<sup>6</sup> State *ex rel.* Warmoth *v.* Graham, 26 La. Ann. 568 (1874).

some extent, even through legal recognition, the governor frequently influences, to a considerable extent, the formulation of public policies. On account of the wide scope of legislative authority over the regulation of the administration, the executive authority must have some share in the exercise of legislative power, if it is to have laws which it can execute sympathetically. A proper coördination of the making and the execution of law thus requires that the executive authority should have some influence over the lawmaking process.

Legally, however, the powers of the governor, whether in determining or in executing policy, are quite strictly construed by the courts. While the legislature, as already noted, is largely a body of general and residuary powers, those of the chief executive are confined to such as are granted, either expressly or by necessary implication, in the constitutions or statutes. Even the doctrine of necessary implication must be applied with caution. As a general rule, therefore, the governor has little, if any, inherent or prerogative powers.<sup>7</sup>

Over the organization of the legislature the governor has no legal power of control. The governor may, however, and sometimes has exerted his personal influence to secure an organization of the legislature which will be in the interest of his legislative program. This is particularly apt to be the case where the governor is considered to be the political leader of his party. A governor who takes a hand in the organization of the legislature runs the risk of being accused of undue interference and usurpation, and this has doubtless deterred some governors from doing so.

A member of the legislature who resigns usually sends his resignation to the governor, and, where a vacancy in the membership of the legislature occurs in this or in some other way, the governor in most states possesses the power or duty of issuing a writ commanding the proper officials to hold a special election to fill the vacancy.

The governor has no control over the time for beginning a regular legislative session, as this is determined by the constitu-

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<sup>7</sup> Richardson v. Young, 122 Tenn. 471 (1910).

tion, nor over the time of adjournment of either a regular or special session, unless there is a disagreement between the two houses. In parliamentary law, the term "disagreement" denotes an *impasse* reached by the two houses through successive unsuccessful attempts at agreement. If such a disagreement exists, the fact is brought to the governor's attention by an official certificate from the presiding officer of one or both houses to that effect, or else he takes cognizance of the fact without formal notification and adjourns the two houses to such time as he thinks proper, not beyond the first day of the next regular session.<sup>8</sup> In a number of states, the governor may on extraordinary occasions, such as in time of disease or uprising, convene the legislature at some place other than the seat of government provided it is not outside the state nor almost wholly inaccessible. Although the reason for taking such action is usually specified in the constitution, nevertheless the governor is the final judge as to whether the emergency exists which justifies his action. This power may, as a rule, however, be exercised by the governor only during the recess of the legislature, for, if the latter body is in session, it may itself take appropriate action in such an emergency.<sup>9</sup> It is seldom, however, that an occasion arises for the exercise by the governor of his power either of adjournment of the legislature, or of changing the place of its sessions.

### Calling Special Sessions

Of more importance is the governor's power of convening the legislature in special session on extraordinary occasions. In some states he may also convene the senate alone in special session for the confirmation of appointments. The final determination of the necessity for a special session rests with the governor, and even though he might be mistaken in his judgment that extraordinary circumstances rendered it desirable that the legislature should be called in special session, nevertheless this

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<sup>8</sup> See Illinois Constitution, Art. V, Sect. 9; *People v. Hatch*, 33 Ill. 9 (1863); and *Debates and Proceedings of the Illinois Constitutional Convention of 1870*, I, p. 776.

<sup>9</sup> *Taylor v. Beckham*, 108 Ky. 278 (1900).

would not have the effect of invalidating the laws enacted at such session.

The governor convenes the legislature in special session through the issuance of a proclamation, in which he is usually required to state the purposes for which the legislature is called together. The importance of this function from the standpoint of the governor's control over legislation is that, in about half the states, the legislation at such session is limited to such matters as the governor includes in his call, or submits to the legislature after its organization. Even in these states, however, there are certain general limitations upon the governor's control of the action of the legislature in special session. In the first place, the restriction upon the action of the legislature is confined to legislative acts, and does not apply to acts which are executive or judicial in character, such as confirmation of appointments and impeachment.

In the second place, the governor cannot control the details of legislation, but only the general subjects or topics. It remains within legislative discretion to select the detailed means whereby such subjects may be provided for. Furthermore, in some states, as in Alabama, the legislature may, by extraordinary majority vote, legislate upon subjects other than those designated in the proclamation of the governor.<sup>10</sup> Again, after issuing his proclamation and therein limiting the legislature to certain subjects of legislation, the governor himself cannot, as a general rule, subsequently broaden the scope of legislation by approving bills relating to subjects other than those included in his original call. The governor of Illinois called a special session in 1912, enumerating certain subjects for legislative consideration. Subsequently, while this session was still in existence, other matters came up requiring legislative action, and the governor thereupon called another special session for their consideration, so that there were two simultaneous special sessions. In order to avoid resort to such an evasion of the constitution, it would be better to provide in that instrument, as is done in some states, that the legislature shall be limited to action

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<sup>10</sup> Constitution of Alabama, Art. IV, Sect. 76.

upon matters contained in the governor's call, or submitted by him during the session. Since the tendency in recent years has been to decrease the frequency of regular legislative sessions, the need and frequency of special sessions has been on the increase. This development has strengthened the control and leadership of the governor in legislation, for in a special session there is less opportunity for evading responsibility for the enactment of needed legislation. The attention both of the legislature and of the public is concentrated to a greater extent upon the subjects brought forward by the governor. Where the governor, however, includes in his call a large number of matters for legislative consideration, many of them of no immediate urgency, as has sometimes happened, his control is weakened, because his fire is scattered.

### The Governor's Initiative in Legislation

The governor's legal powers of participation in lawmaking are exercised principally through the sending of messages and recommendations to the legislative body proper, at either a regular or special session, and through the approval and veto of its acts. Although the governor may be considered as a component part of the lawmaking power, nevertheless, in deference to the doctrine of separation of powers, he is not accorded a seat upon the floor of the legislature, nor is it customary for him to address that body in person. In submitting his views on public questions to the legislative body as a whole, he is therefore usually confined to the submission of messages and recommendations in writing. This he is required to do at the opening of legislative sessions, and in some states also at the end of his term. He may, in addition, send special messages at any time during the session. In these messages, both regular and special, he gives the legislature "information as to the condition of the state, and recommends such measures as he shall deem expedient." The term "measures," as here used, does not legally preclude the governor from submitting his recommendations in the form of completely drafted bills. This, however, is not usually done, for, however beneficial such a practice might be upon the character of the legislative product, it would probably

be denounced as a violation of the principle of separation of powers, and as an encroachment upon the legitimate functions of the legislative body proper, and would therefore cause needless friction between the legislative and executive departments of the government.<sup>11</sup>

The message of the governor at the opening of regular sessions usually gives prominence to a statement of the financial condition of the state. In a number of states, he is specifically required to submit a state budget, containing the amounts recommended by him to be appropriated to the respective departments and institutions and for all other public purposes, the estimated revenues from taxation and from other sources, and an estimate of the amount required to be raised by taxation. Thus the budget, when it reaches the legislature, has the official support and authority of the governor behind it, though legal control over the appropriation and revenue acts still remains largely with the legislature, subject to the power of the governor to veto appropriation items. Under the system of local representation in the legislature, that body is under no adequate sense of responsibility to the state at large in making appropriations. The financial budget, therefore, including all contemplated items of appropriation, should originate from and be initiated by the governor, as the responsible head of the state government, subject to the power of the legislature to criticize the proposals and to reduce the amounts.

If the governor is looked upon as the leader of the party having the majority in the legislature, his initiative in lawmaking will naturally be stronger, and his recommendations will be more likely to be adopted. The recommendations of the governor are usually more definite and concrete than the planks contained in the party platform. The governor is not, of course, confined to the platform proposals in suggesting legislation, but if such proposals are endorsed by the governor in his message to the legislature, they are much more likely to be adopted than

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<sup>11</sup> In Alabama, however, the governor, acting jointly with the state auditor and attorney-general, is required, before each regular session of the legislature, to prepare a general revenue bill, and submit it to the legislature for its information.

they would be if the governor ignored them.<sup>12</sup> Sometimes the candidate for governor is nominated in party primaries before the convention meets at which the party platform is drawn up, in which case he will naturally be consulted as to the important planks of the platform.

### Approval and Veto of Bills

Every bill which has passed the two branches of the legislative body proper must be submitted to the governor for his approval or disapproval. In some states resolutions also must be submitted to the governor, but this does not include such resolutions as those relating to adjournment or rules of procedure, to constitutional amendments or measures submitted to popular referendum, which do not, as a rule, go to the governor. The time allowed the governor while the legislature is in session, to consider a bill before taking action upon it, varies from three to ten days. If the governor fails to take action upon the bill within the specified period, it becomes a law, unless the legislature previously adjourns, in which case the governor may usually either approve the bill or exercise what is known as his "pocket veto." The period allowed the governor for consideration of measures after adjournment tends to be longer than that allowed while the legislature is in session, and, in view of the great mass of legislation usually left over at the end of the session and the great responsibility for the careful sifting of measures thus placed on the shoulders of the governor, the period allowed him for consideration after adjournment should be still further lengthened.

In a number of states the governor may, for a specified period after the adjournment of the legislature, prevent a bill from becoming a law by filing it with his objections in the office of the secretary of state. The power of the governor to veto bills after the adjournment and even during the last few days of the legislative session is especially important, as it then becomes practically impossible to repass the measure over his veto. It is

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<sup>12</sup> Cf. B. Y. Berry, "The Influence of Political Platforms on Legislation in Indiana," *American Political Science Review*, February, 1923, p. 64.

frequently the custom in legislative bodies to rush through important measures, particularly appropriation bills, during the last few days of the session, and over these measures the governor is therefore able to exercise what is virtually an absolute veto. Indeed, to such an extent has this tendency sometimes gone that the real work of legislation may be said to begin after the adjournment of the legislature.<sup>13</sup>

In the national government the veto power of the president has sometimes been crippled through the attachment by Congress of "riders" or extraneous matter to appropriation bills. Profiting from this experience, as well as from similar practices in the states themselves, most of the states now allow the governor to veto items in appropriation bills, and a few of these also allow him specifically to disapprove sections of any bill. In many states, however, having no specific grant of power to the governor to veto parts of bills other than appropriation bills, the same result is frequently reached through the operation of the provision generally found in state constitutions that no bill, except general appropriation bills, shall embrace more than one subject, which shall be plainly expressed in the title.<sup>14</sup> The term "item," however, is narrower than the term "subject," and embraces any part of a bill which is sufficiently distinct that it may be separated without serious damage to the essential force of the residue. The power of the governor to veto items of appropriation bills is of especial importance as giving him considerable influence, not only over legislation, but also over the entire range of state administration. This power would obviously be much increased if the governor were able not only to veto an item but also to reduce the amount of a specific appropriation. The governor may approve the object of an appropriation but consider that the amount is out of proportion to the requirements of the case, or beyond the prudent use of the public funds. Under these circumstances he is nevertheless forced

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<sup>13</sup> P. S. Reinsch, *American Legislatures and Legislative Methods*, p. 284.

<sup>14</sup> Cf. Joseph Barthélemy, *Le rôle du pouvoir exécutif dans les républiques modernes*, p. 70; and remarks of Mr. Barbour in *Virginia Constitutional Convention of 1901-2, Proceedings and Debates*, II, p. 1875.



either to approve or disapprove the whole amount. In Pennsylvania, however, although there is no express constitutional authorization, the Supreme Court has held that the governor may veto part of a specific appropriation, and the governors of that state have frequently availed themselves of this power.<sup>15</sup> The power of reducing items has also been exercised, without express authorization, by the governors of Illinois, Oklahoma, Idaho, Maryland, and other states. In Illinois and Oklahoma, however, this practice has been checked by decisions of the supreme courts of those states.<sup>16</sup>

Governors throughout the country are exercising the power of vetoing items of appropriation bills with increasing frequency, and the number of occasions arising where the action of the legislature renders the exercise of this power necessary or desirable is also on the increase. The control of the governor over appropriations is sometimes impeded by the skill of the framers of the appropriation bills in so intertwining the various items of a bill as to prevent the governor from vetoing an item without defeating the whole object of the bill. Legislatures have sometimes, either by inadvertence or design, placed the governor in an awkward and embarrassing position by adjourning after making appropriations largely in excess of the anticipated revenues or of what the state treasury will bear. In order to preserve the financial integrity of the state and avoid a deficit, the governor is then forced to reduce the total amount of the appropriations, though knowing that by so doing he will incur the displeasure and criticism of the persons, institutions, or interests who would otherwise benefit thereby. More serious still, he may, by vetoing a particular item, so offend the member or members of the general assembly who are interested in securing the passage of such item as entirely to alienate them from the support of his own legislative program. In cutting down appropriations, therefore, the governor must usually be imbued with a high order of courage and a deep belief in the support of his action by the mass of the people.

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<sup>15</sup> *Commonwealth v. Barnett*, 199 Pa. St. 161 (1901).

<sup>16</sup> *Fergus v. Russel*, 270 Ill. 304 (1915); *Regents of the University of Oklahoma v. Pratt*, 28 Okla. 83 (1911).

A power somewhat similar to that of vetoing parts of bills, but one that associates the governor even more intimately in the actual process of legislation, is that conferred on him by the constitutions of a few states whereby he may propose the amendment of a bill with respect to any feature which he disapproves, and the proposal of the governor must be considered by the legislature before final action on the bill. The object of this provision is to prevent needless friction between the executive and the legislature which may occur if the veto power is held as a club over the heads of the legislature. It is based upon the salutary principle that the governor and the legislature should coöperate in the actual process of legislation so as to enact laws representing their combined wisdom and views. In a word, it facilitates conference and agreement between the governor and the legislature.<sup>17</sup> Governors could doubtless exercise this power of suggestion in the absence of such a constitutional provision, but the presence of the provision gives greater authority to the governor's action, and disarms any criticism of executive usurpation which might otherwise sometimes be made.

Except after adjournment of the legislature, the governor's veto is not absolute, nor is it arbitrary in character, for he is uniformly required, when disapproving a bill, to return it to the house in which it originated with a statement of his objections to it. This provision is designed both to hold the governor to some accountability for his acts and also to afford the legislature the benefit of the governor's views when they come to consider the measure. No definite limit is set upon the character of the reasons which the governor may assign for a veto, and they may relate either to the unconstitutionality or the inexpediency of the proposed measure.

The action of the legislature, upon the return to it of a vetoed measure, is subject to certain restrictions which are designed both to secure due consideration for the governor's objections and to place upon the members of the legislature a proper sense of responsibility for their votes. In New Jersey no action can

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<sup>17</sup> See *Proceedings and Debates of the Virginia Constitutional Convention of 1901-2*, I, pp. 1027-1050.

be taken by the legislature upon the same day on which the vetoed measure is returned. In nearly all the states the governor's objections must be entered at large upon the journal of each house, and in most states the vote on repassage must be by yeas and nays and the names of the members voting for or against the repassage of the bill must also be entered upon the journals.<sup>18</sup> The most important restriction upon legislative action, however, is the requirement in most states of an extraordinary majority vote for repassage over the governor's veto. The mere fact that a bill requires for its original passage a majority equal to that necessary for its repassage over the veto does not absolve the legislature from the necessity of repassing it, if it is to become a law,<sup>19</sup> for a sufficient number of votes may be, and sometimes are, changed through the force of the governor's arguments to prevent its repassage. The governor's veto is, in fact, not often overridden, particularly if the governor is in political harmony with the majority of the legislature or if there is not an overwhelming public sentiment in favor of the enactment of the measure.<sup>20</sup>

The veto power has probably been freely exercised by the majority of governors, and, during the nineteenth century, the frequency of a governor's vetoes was one of the principal gauges of his popularity. The extent of the governor's negative influ-

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<sup>18</sup> *The Veto Power in the Several States*, Bulletin No. 1 of the Rhode Island Legislative Reference Bureau.

<sup>19</sup> In some states, however, the legislature is not required, in this case, to repass it.

<sup>20</sup> Other methods which have been suggested from time to time for dealing with the executive veto in legislation include proposals to refer the matter to the people so that a vetoed bill shall not become a law unless ratified by popular vote at the next general election (*Debates and Proceedings of the Ohio Constitutional Convention of 1850*, p. 55); and that a vetoed bill shall not become a law unless repassed by the legislature at the next succeeding session (*Debates and Proceedings of the Illinois Constitutional Convention of 1870*, II, p. 1376). The former suggestion has been adopted by the Committee on State Government of the National Municipal League in the provision of their "Model State Constitution" that a vetoed bill may by majority vote of the legislature be submitted to a popular referendum. It is also provided that the governor may submit to referendum any bill failing of passage in the legislature when at least one-third of the members voted for it (Sect. 27).

ence over legislation, however, is not to be measured merely by the actual number of his vetoes, for, although it is not usually considered good legislative ethics to argue against a bill on the ground that the governor will veto it if passed, nevertheless the governor's attitude towards pending legislation is often a matter of common knowledge, and such knowledge may cause a bill to be modified or prevent its passage altogether. Political harmony between the legislative and executive branches, as well as subserviency of the governor to the legislature, may decrease the number of bills actually vetoed.

The value of the executive veto from the standpoint of its influence upon the character of legislation can scarcely be doubted. Legislatures sometimes pass bills containing provisions which duplicate or, worse still, contradict provisions in the same or some other bill. The contradictions may be harmonized by judicial interpretation, but, meanwhile, the law is uncertain, and the best interests of the state require that it be vetoed. One of the principal uses of the executive veto is thus to give unity and coherency to the legislative product.

Although the veto power has been an important influence in improving the quality of the legislative output, the influence which it exerts is largely of a negative character. Some positive influence may be exerted by the existence of the veto power when it is known by the legislature that unless certain provisions are inserted in a bill, it will not receive the governor's approval; or after a bill has been vetoed, it may be amended so as to meet the governor's views. In the main, however, the governor has no legal power of exercising positive control over legislation except such as may be derived from his power of sending messages and recommendations to the legislature. In practice, however, the governor is not confined to the powers legally conferred upon him, but may bring his personal influence to bear in various ways in promoting a given program of legislation. Some governors have considered their principal achievements to lie in the field of important legislation secured rather than in that of administrative results. When the governor and the legislature are in political harmony and the governor is looked upon as the leader of his party in the state, his per-

sonal influence in determining the important features of the legislative output is naturally accentuated.

It should be noted that the practice of political parties in drawing up their platform after the candidates for governor have been nominated tends to give greater influence and control to the governor, when elected, over the legislative program of the party. The practice of nominating candidates for governor by the direct primary method also tends to increase the prestige and the influence of the governor as the leader of his party. There has undoubtedly been within recent years a change in public opinion which is reflected in the attitude of the legislature, so that the governor's positive influence in legislation is no longer looked upon as usurpation but as both legitimate and desirable. This tends to render the governor's legislative power commensurate with his responsibility. Under existing conditions the governor is practically obliged to take a hand in legislation, if he is to exercise any control over the administration, inasmuch as the latter is largely subject to legislative direction rather than to executive order.

The governor should be given, either in person or by representative, the power to appear before a committee of the whole house or a joint committee of the general assembly, and advocate and defend in public meeting the administration measures, instead of having to summon to private conferences members whose support he desires, as he is practically forced to do under the present system. The strength of the governor's position in urging his legislative measures is, of course, largely enhanced if he is able to secure widespread popular support for his program. His success is largely determined by his ability to take the people into his confidence, to enlist the support of influential leaders within and without the legislature, and to bring full publicity to bear throughout the whole course of legislation. A governor is usually more influential in legislation during the first session of his term.

### **The Governor's Administrative Powers**

At the beginning of the development of the state governments, the governor, as we have seen, was principally a political officer,

while control of the administration was almost entirely in the hands of the legislature. The latter body still retains large powers of control over the administration, but the governor's administrative powers have increased and, though still subject to serious limitations, are by no means negligible. The constitutions vest in the governor the "*supreme* executive power," which implies that subordinate executive powers are vested in other officers. This is in fact the case, for they also provide that the executive department shall consist of a governor, lieutenant-governor, secretary of state, and other officers. On the whole, however, whatever the particular wording of these provisions, the result, in respect to the governor's powers, is, for all practical purposes, the same. The courts have almost uniformly held that the governor has little or no inherent executive power under these provisions. In other words, the rule of delegated powers and strict construction has been nearly everywhere applied to the governor, so that legally he is not usually considered as having any particular power unless it is granted to him, in the constitution or statutes, either expressly or by necessary implication.<sup>21</sup>

A general administrative power of the governor, found in practically all the constitutions, is that which authorizes him to "take care (or see) that the laws are faithfully executed." This provision merely vests in the governor a rather vague and general power of supervision over other state and local officers in whose hands the direct execution of the laws is placed. It is of relatively little importance except in so far as it is supplemented by other more specific constitutional or statutory grants of power.

Aside from any question of legal power, the governor may exert his personal influence and bring pressure to bear upon officials by means of publicity and in other ways in order to secure the enforcement of the laws. Ordinarily, however, the

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<sup>21</sup> Field v. People, 3 Ill. 79 (1840); State v. Bowden, 92 S. C. 393 (1912). The principal exception to this doctrine is where it is held that the governor may exercise a power which, though not granted to him either expressly or by necessary implication, is, nevertheless, incidental to an expressly granted power. Cf. Keenan v. Perry, 24 Tex. 253.

governor merely supervises to some extent the officers upon whom rests the duty to carry out the various laws of the state. Such supervision, however, is very incomplete and the machinery for the execution of the laws is for the most part in the hands of officers, both state and local, over whom the governor has little or no control. If the governor is to be held responsible for the execution of the laws and for the fulfillment of his oath to support the constitution, then it logically follows that he ought to have full control over the selection and the official acts of those agents who are the "arms of the governor," and upon whom he must depend to a large extent for the enforcement of the laws. In this respect, however, the organization of the state administration is far from logical.

### The Power of Appointment

The legal powers whereby the governor exercises control over the personnel of the administration are those of appointment to office, supervision or direction while in office, and suspension or removal from office.

In the more recent constitutions, the governor's power of appointment has been broadened. Furthermore, the legislature, in creating during late years a large number of new officers and boards, has usually vested their appointment in the governor. The increase of the governor's power of appointment has been due, not only to the unsatisfactory nature of other methods, but also in part to the influence of the increasing complexity of social and economic conditions of modern life, and to the consequent feeling that there should be an increase in the effectiveness of executive and administrative action, in order that the purposes for which the executive authority is established may be more fully effectuated. In spite of this tendency, however, the governor's power of appointment is still greatly inferior to that of the President of the United States, and is subject to serious limitations.

The officers whom the governor may appoint, whether under the constitution or statutes, belong principally to the state executive department, but he also has some power of appointing judicial and local officers. The governor has, on the whole, a

considerable patronage. Beginning immediately after his election and extending well into his term, a governor-elect or new governor is usually besieged by a horde of office seekers. This condition is especially apt to be produced when there has been a change of party as well as a change or impending change of administration. A governor of the spoilsman type may welcome such a situation as it enables him to build up a political machine. It is probable, however, that few governors really relish the duty of making wholesale appointments to hundreds of state positions, many of which are useless and a needless expense to the state. Even were all needless positions lopped off, there would still be many minor offices which might well be left to be filled by the governor's subordinates, or under civil service regulations, leaving him free to devote his attention only to the important appointments and to his legislative program.

The governor's appointive power does not, as a rule, extend to the heads of executive departments established by the constitution, such as the secretary of state and attorney-general, who are usually chosen by popular vote. This method tends to make these officers independent of the governor and thus to disintegrate the administration. The disintegration of the administration has been further increased by the practice of the legislature in conferring, by statute, administrative powers on the constitutional state officers, other than the governor, and especially by the legislative practice of continually creating new boards, commissions, and administrative agencies. The fact, however, that the governor and the heads of executive departments are elected at the same time and on the same ticket brings it about that they almost invariably belong to the same political party, though sometimes to different factions of the same party. While the wishes of the candidate to be nominated for governor may be consulted as to who shall be his running mates for the other principal offices on the same ticket, it is nevertheless true that legally the governor has no control over the choice of the heads of departments. They have never been considered as occupying the same relation towards the governor that the members of the President's cabinet in the national government occupy towards their chief. Although party considerations may



bring the corresponding state officers into close touch with the governor, nevertheless they are not in legal contemplation considered as the confidential advisers of the governor, for they are not subject to his direction, but, on the other hand, their duties are prescribed by law.

Although it thus appears that the selection of the older constitutional officers, usually denominated heads of departments, has not yet been placed in the hands of the governor, nevertheless to him has been intrusted the appointment of most of the newer administrative bodies, boards and commissions, created within recent years. The powers and duties of some of the older constitutional officers are still quite important, but relatively to those of the whole body of existing state administrative agencies, they are not now so important as formerly. The governor's power of appointment of these newer agencies, therefore, represents an increase of his control over the personnel of the administration that is worthy of notice. There are, however, limitations upon his power of control which materially diminish its importance. In order to insure some degree of continuity in the policies of state boards and commissions, the practice is usually followed of gradually renewing their personnel through the device of overlapping terms and the appointment of one or more new members each year. Therefore, where a board consists of seven or nine members, a governor may not, during his term of office, have an opportunity of appointing a majority of the board. This naturally decreases what little control the governor might otherwise have over the conduct of such boards.

A large majority of the most important appointments at the disposal of the governor are subject to the confirmation of the senate. The ostensible objects of the arrangement are to secure a greater degree of popular control over appointments, to give the governor the benefit of capable advice, and to prevent the entrance of party considerations into the making of appointments. These objects, however, are seldom, if ever, fully attained, and frequently not at all. On the contrary, the division of power and responsibility between the governor and the senate ordinarily lessens popular control over appointments and makes directly for the entrance of party considerations. It may hap-

pen, and frequently does happen, that the governor is under the necessity of consulting the influential leaders of the party in the senate before making appointments. It must be admitted that, in the past, such consultations have frequently had one or the other of two results: either the governor has agreed to nominate to important administrative posts men who are acceptable to the party leaders in return for the passage of legislation which he desires, or else the governor has yielded to the senate on matters of legislative policy in return for the consent of that body to ratify the nomination of men whom he desires to appoint. If the power of appointment were concentrated in the hands of the governor alone, there would still be a possibility that the governor might sometimes be tempted to trade appointments desired by party leaders in the legislature for favorable votes on administrative measures. There would, however, be much less danger of such a result, because the sole responsibility for the appointments would rest squarely upon the governor. He could not blame the senate for bad appointments, and he would not so readily run the risks of incurring popular disapproval through making purely partisan appointments without regard to the qualifications of the appointees for the positions. Under the limitation of confirmation by the senate, there is usually little sense of responsibility either in the appointing authority or in the appointee. The subservience of the governor is sometimes such that the real power of appointment is in the senate. The considerable powers of appointment which the legislature formerly possessed have been largely shorn away, but the present system of appointment is a compromise between legislative and executive control, which, in practice, often transfers the real control to the invisible powers behind the government.

### The Power of Supervision

The governor has no legal powers of supervision or direction except in so far as they are specifically granted by the constitution or statutes. The governor has no power of organizing the administrative services of the state into departments, nor as a rule can he, in the interests of efficiency, transfer a particular function or service from one department to another. These

matters, as well as the specific duties to be performed by state officers, are as a rule largely regulated by law.<sup>22</sup> The power of appointment, in and by itself, confers upon the governor no legal power of control over his appointees after they have assumed office.

Any power of supervision over state boards and commissions which the governor's power of appointing their members enabled him to exercise has been seriously impeded by the multiplicity and lack of systematic organization of such agencies. Some degree of supervision arises from provisions generally found in state constitutions empowering him to see that the laws are faithfully executed, and to require information in writing from the officers in the executive department upon any subject relating to their duties. Such requisitions for information may be made at any time. In addition, such officers are also required in most states to make regular reports to the governor at periodical intervals. These provisions may sometimes be useful in enabling the governor to investigate and bring to light irregularities or other facts of a compromising character. Nevertheless, they have not operated in practice to give the governor any very effective, comprehensive, or continuous control over the administration. Requests for information are apt to be spasmodic and special in character. The control which they exert may have the effect of guarding against or unearthing glaring irregularities, but in themselves they are not well adapted positively to assure efficiency in administration. Furthermore, official reports and answers to requests may often be drawn up in such a manner as to conceal or gloss over the essential facts.

### The Power of Removal

The general rule governing the relation between the governor and other state executive or administrative officers is that the duties of the latter are determined by law and not by the direc-

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<sup>22</sup> *Pickney v. Henegan*, 2 Strob. (S. C.), 250 (1848); *Collins v. State*, 8 Ind. 344 (1856); *State v. Bailey*, 16 Ind. 46 (1861); *Slack v. Jacob*, 8 W. Va. 612 (1875); *People v. Santa Clara Lumber Company*, 106 N. Y. S. 624 (1907).

tion of the governor. This is especially true in the case of elective officers. An important exception to this general rule, however, is found in the governor's power of removal, which, though still insignificant as compared with that of the President of the United States, has nevertheless shown signs of growth within recent years. The state governor, it is true, is not considered as having any power of removal, either as a result of his general executive power, or as an incident of his power of appointment.<sup>23</sup> What power of removal the governor has must, as a general rule, be derived from some specific provision of the constitution or statutes. This necessity of a special grant in order that the power may be exercised has operated to prevent a rapid extension of the governor's removal power. A more important influence, however, in hindering the growth of the governor's power of removal was the fear that it might be used for partisan purposes, and thus introduce the spoils system which obtained in the National Government.

The removal power of the governor has been extended, not only by constitutional provision, but also by legislative action. This provision renders the power of the governor to some extent commensurate with his responsibility and probably has a more important influence than any other single provision toward making the governor the real, instead of merely the nominal, head of the administration. Under the existing method of selecting the heads of the state executive departments and the system of decentralized enforcement of state law, however, the governor cannot fully assume the position of real head of the administration by virtue of his power of removing his appointees.

The fact that the constitution gives the governor the power to remove those officers whom he may appoint does not necessarily preclude the legislature from conferring upon the governor the

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<sup>23</sup> *Field v. People*, 3 Ill. 79; *Dubuc v. Vess*, 19 L. R. A. 210; *State v. Rhame*, 75 S. E. 881 (1912); *Nicholson v. Thompson*, 5 Rob. (La.) 367 (1843); *McDonald v. Brunett*, 92 S. C. 469 (1912). But see *Keenan v. Perry*, 24 Tex. 259 (1859), where it was said that when the tenure of an office is not fixed by the constitution or statutes and there is no provision for removal, the continuance of the incumbent in office is determinable at pleasure by the governor.

power of removing other officers not appointed by him.<sup>24</sup> In spite, however, of the numerous instances where the governor may exercise the removal power, it still remains true, on the whole, that this power is rather narrowly limited. The limitations upon the power may be said to arise from two main causes: first, through withholding the grant of the power either altogether or with respect to certain classes of officers and, secondly, through placing restrictions upon the methods which must be employed in exercising the power and upon the finality of such exercise.

With regard to limitations as to the classes of officers whom the governor may remove, it is true as a general principle that he has less power of removal over elective than over appointive officers, and less over local than over state officers. It has usually been thought that, when an officer derives his authority from a source as high as that by virtue of which the governor himself acts, he should not be subject to removal by the latter, except in exceptional cases. The application of this idea has been a potent cause of disintegration in the administration, but the need for greater concentration of authority has brought a slight reaction. The doctrine, however, though not so prevalent as formerly, is still widely held.

The exercise by the governor of the power of removal may be either summary or only for cause. In the case of the governor, however, the possession of summary power is exceptional. Removal in such case may be effected through the mere appointment of the successor. In the large majority of cases, however, the constitutions and statutes conferring this power provide that it may be exercised for cause, either for any good and sufficient cause or for specified causes, such as incompetency, neglect of duty, or malfeasance in office. Where this is the case, or where the officer holds during good behavior, the important questions arise as to what methods the governor must follow in determining the existence of the specified causes and whether his determination is final or subject to review by some other body.

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<sup>24</sup> See Hurd's *Revised Statutes of Illinois*, 1912, p. 810; and *People v. Nellis*, 249 Ill. 12 (1911).

It frequently happens that no method is provided in the constitutions or statutes, for the determination of the existence of the specified causes. Under such circumstances, it has sometimes been held that the governor may adopt such mode of procedure as he may deem proper and right, and it is not for the courts to dictate to him in what manner he shall perform the duty. Therefore, no written charge, notice or formal trial is necessary, though such may, as a matter of custom, be accorded.<sup>25</sup> The weight of judicial opinion, however, is to the effect that removal cannot take place "without reasonable notice, without any charge or specification, and without any hearing or opportunity given to the officer to make his defense."<sup>26</sup> This position is, *a fortiori*, taken by the courts when the constitutions or statutes specifically require notice and hearing of charges.

In reviewing the action of the governor in removing an officer, the courts confine themselves to passing upon the regularity of the proceedings and to determining whether the formalities required by the constitution or statute have been complied with by him. The governor is the exclusive judge, so far as the courts are concerned, of the sufficiency of the proof of the charges, and his findings and consequent act of removal are not reviewable by the courts. They will not, as a rule, inquire into the question as to whether the charges adduced warrant the governor in making the removal, nor will they set aside his action on the ground that he was improperly influenced. The latter function, however, is sometimes vested in the legislature or senate. It has occasionally been held that, where the governor has the power of appointing an officer subject to the concurrence of some other body, he can remove such appointee only

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<sup>25</sup> Wilcox v. People, 90 Ill. 186 (1878); Kecnan v. Perry, 24 Tex. 253 (1859); State v. Cheetham, 19 Wash. 330 (1898); State v. Samaulia, 33 La. Ann. 446 (1886); State v. Hawkins, 44 Ohio St. 98 (1886); Trimble v. People, 19 Colo. 187 (1893).

<sup>26</sup> Dullam v. Willson, 53 Mich. 392 (1884); Page v. Hardin, 47 Ky. 648 (1848); People v. Denman, 65 Pac. 455 (1905); Commonwealth v. Slifer, 25 Pa. St. 23 (1855); Benson v. People, 10 Colo. App. 175 (1897); Ekern v. McGovern, 154 Wis. 157 (1913). For additional cases, see *Columbia Law Review*, XIII (1913), p. 754.

with the concurrence of the same body.<sup>27</sup> This, however, is by no means necessarily true unless it is expressly so provided by constitution or statute. Such provisions sometimes do not go so far as to require the concurrence of another body, but merely that the reasons for the removal shall be reported to such body. Thus, it is required that the governor shall file a statement of the reasons for his action in removing an officer in the office of secretary of state or transmit a report of the causes therefor to the legislature at its next session, or both.<sup>28</sup> Under this provision, however, no action on the part of the body to which the report is made is necessarily contemplated. The principal object of the provision appears to be to bring the light of publicity to bear upon the reasons which the governor assigns for his actions, to place him under a greater sense of responsibility, and to enable the people to judge as to the sufficiency of such reasons. In some states, however, the removal power of the governor is subject to a more real and effective check through the requirement that it can be exercised only with the consent of the senate.

Of the various means of administrative control which we have considered, the power of removal is by far the most potent. Upon the possession of this power the governor must largely base his direction and control of the administration. The potency of the power is not to be measured merely by the frequency of its exercise, for the existence of the power, as distinguished from its exercise, is one of the most efficacious means of administrative control that can be devised. The energy with which the state business is managed is largely dependent upon the extent to which this power is conferred upon the governor.

A further extension of the removal power in the hands of the governor would, by giving him larger control over his subordinates upon whom he must depend for carrying on the business of the state, probably conduce to greater efficiency of administration. It is, of course, true that the power may be abused. Unfortunately, governors may, and sometimes do, remove ad-

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<sup>27</sup> Finley and Sanderson, *American Executive and Executive Methods*, p. 94.

<sup>28</sup> Constitution of Michigan, Art. IX, Sect. 7; Session Laws of Utah, 1909, Chap. 121, Sect. 4, p. 290.

ministrative officers merely for political reasons. Governors sometimes institute investigations into the official conduct of subordinate officers who are politically obnoxious to them with the preconceived intention of finding, if possible, some plausible reasons for removal, which will pass muster before the public eye. To prevent the injection of political considerations into the conduct of positions which are purely administrative or ministerial in character, the governor's power of removal should probably be confined in its application to those officers the exercise of whose discretionary powers may affect the policy of the administration. If, with this limitation, the power is still abused, the true remedy for such derelictions on the part of the governor must be sought in his political responsibility to the people.

### The Military Power

In all of the states the governor is constituted the commander-in-chief of the state militia, and may, under certain conditions, call them into service. When in the actual service of the United States, however, they are under the command of the President. In a number of states the governor is also made commander-in-chief of the army and navy, but inasmuch as the states cannot keep troops or warships in time of peace without the consent of Congress, this power is ordinarily of no importance except in time of war. Although the governor is commander-in-chief of the militia when in the service of the state, it is not necessary that he should command them in person. This would ordinarily be of doubtful propriety, as the governor is usually a civilian, without extensive military experience.

In controlling the militia the governor ordinarily acts through an officer known in most states as the adjutant-general, who is usually appointed, and sometimes also removable, by him. Through him are transmitted the directions, rules and regulations issued by the governor relating to the organized militia or National Guard. The governor may also call out the unorganized militia, if occasion demands, and organize them. All rules and regulations issued by the governor relating to the militia are, however, subject to the limitations imposed by valid acts of the



state legislature and the concurrent jurisdiction of Congress to organize and discipline the militia.<sup>29</sup>

The purposes and objects for which the state militia may be called out, as specified in the state constitutions, are usually the same as those enumerated in the Constitution of the United States, *viz.*, to execute the laws, suppress insurrections, and repel invasions. These phrases are sufficiently broad to cover practically every sort of emergency which might necessitate the use of the militia. Whether the occasion requires the calling out of the militia is a question of which the governor is practically the sole judge, and he may act entirely on his own initiative and responsibility. In practice, however, he usually waits until he receives a request for assistance from the sheriff, states' attorney, mayor, or other law-enforcing officer. The most frequent use of the militia has been to disperse mobs which are attempting to take the law into their own hands, and, within recent years, to maintain order during disturbance incident to strikes and lockouts.

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<sup>29</sup> Constitution of U. S., Art. I, Sect. 10; *Houston v. Moore*, 5 Wheaton, 1.

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## CHAPTER IX

### STATE ADMINISTRATIVE ORGANIZATION

STATE officers are to be distinguished from local officers on the one hand, and from state employees on the other. State officers are usually defined as those whose functions are coëxtensive with the state, or to whom is delegated the exercise of a portion of the (so-called) sovereign power of the state, while the functions of local officers are ordinarily confined to the territorial limits of particular political subdivisions of the state. The tenure of state employees rests upon contract while that of state officers does not.

#### The Lieutenant-Governor

Next in rank to the governor among state officers stands the lieutenant-governor, an officer found in about thirty-five states. He is elected at the same time as the governor and the same qualifications are usually prescribed for him. He may be classed as an executive officer with normally legislative functions. He succeeds to the office of governor in case of the latter's death, resignation, impeachment, disability, and, in some states, during the governor's absence from the state. It has been held, however, that the lieutenant-governor does not succeed in case of the governor's temporary absence, unless such absence affects injuriously the public interest.<sup>1</sup> When succeeding to the governorship, the lieutenant-governor comes into possession of the former governor's rights, duties, powers, and emoluments.<sup>2</sup> In some states it is provided that in case of vacancy in the office of lieutenant-governor, the president *pro tempore* of the senate shall succeed to that office. In case of a

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<sup>1</sup> State *v.* Graham, 26 La. Ann. 568 (1874).

<sup>2</sup> It has been held that the governor has no power to revoke a pardon granted during his absence from the state by the lieutenant-governor as acting governor. *Ex parte Crump*, 135 Pac. 428.

vacancy in the offices of both governor and lieutenant-governor, the succession is usually the same as in states which have no lieutenant-governor, *vis.*, the president of the senate succeeds and, after him, the speaker of the house.<sup>3</sup>

Except in case of succession to the governorship, the rôle which the lieutenant-governor plays is a relatively insignificant one. He presides over the senate, but ordinarily has no part in the deliberations of that body, and no vote except when the senate is equally divided. On this account, the lieutenant-governor is sometimes regarded as a mere fifth wheel to the cart, which might as well be dispensed with. On the other hand, it has been proposed that the office be rehabilitated by giving it some real power. In one or two states he is given the power to vote and take part in the debate in the committee of the whole, and this plan has been proposed in others.<sup>4</sup> It has also been proposed that the office of secretary of state be merged with that of lieutenant-governor, thus inducing abler men to seek it.<sup>5</sup> If by some such means the office could be made more attractive, there would seem to be a decided advantage in retaining it in order to provide a suitable successor to the governorship in case of need. The president of the senate or speaker of the house, on account of the fact that they are elected by the voters of only a small part of the state, are not so suitable for this purpose as an officer such as the lieutenant-governor, who is elected at large and is supposed, at least, to represent the people of the whole state.<sup>6</sup>

### The Executive Council

A body known as the executive or governor's council, frequently found in the English colonies and under the first state constitutions, has survived in a few states, including Massachusetts, Maine, New Hampshire and North Carolina. In the last-named state it is an *c.v. officio* body, in Maine chosen by

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<sup>3</sup> See *State v. Sadler*, 23 Nev. 356.

<sup>4</sup> See Proceedings of the Illinois Constitutional Convention of 1847, *Illinois State Register*, July 20, 1847, I, No. 18.

<sup>5</sup> *Debates of the Louisiana Constitutional Convention of 1845*, p. 280.

<sup>6</sup> Cf. *Debates of the New York Constitutional Convention of 1846*, p. 168.

the legislature and in the other states elected by the people. The latter method makes it a more independent body, but in no state does it retain any considerable importance or influence.

### Heads of Departments

After the lieutenant-governor and the executive council we find in most states a large body of state executive or administrative officials whose titles, duties and powers differ in different states. Although no hard and fast line of demarcation can be drawn, they may, in general, be divided into two main groups. The first group is composed of the older officers, usually provided for by the constitution and known as heads of executive departments, such as the secretary of state, attorney-general, treasurer, auditor or comptroller, and superintendent of public instruction. The members of the second group of state officers are usually provided for by statute, and have been created principally in order to deal with certain economic and social conditions which have arisen in comparatively recent years. Frequently, they are multiple in form. Among them may be mentioned banking and insurance commissioners, factory inspectors, state boards of health, and industrial and corporation commissions. The first group of state officers are usually elective, while the officers of the second group are ordinarily appointive.

The state constitutions usually provide that the executive department shall consist of the governor, lieutenant-governor, secretary of state, attorney-general, state treasurer, and one or two other officers. It has been held, however, that the constitutional provision as to what constitutes the state executive department does not limit the executive officers of the state to those mentioned in such provision.<sup>7</sup> The purpose of such a provision, it has been held, is to provide for such officers as the framers of the constitution deem indispensable, leaving to the legislature the creation of new offices when they become necessary.<sup>8</sup>

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<sup>7</sup> *State v. Womach*, 4 Wash. 19, 29 Pac. 939.

<sup>8</sup> *Parks v. Commissioners of Soldiers' and Sailors' Home*, 22 Colo. 86, 43 Pac. 542.

### The Secretary of State

The state executive officer, known as the secretary of state or the secretary of the commonwealth, is found in all the states. He is elected by popular vote in all the states except Pennsylvania, New Jersey, Delaware, and Maryland, in which he is appointed by the governor with the consent of the senate. The prevalent method of popular election of the secretary of state renders him practically independent of any superior administrative control, but his powers and duties are largely regulated by the constitution and statutes. Such regulation sometimes goes into rather minute detail, as in the case of the Idaho statute requiring the secretary of state to keep his office open for business during certain hours of the day.<sup>9</sup> So large is the control of the legislature over the secretary of state that it has even been held that the legislature may devolve on him the performance of services foreign to the office and may pay him a salary therefor in addition to his salary as secretary of state.<sup>10</sup>

The powers and duties of the secretary of state are of a heterogeneous character. In Massachusetts until 1863 and in New York until 1867 he acted as state commissioner of charities to the extent that he received from the local overseers or county superintendents of the poor annual reports containing such information as he might direct. In New York, Illinois, and Louisiana he acted for a time as *ex officio* state superintendent of public instruction, and in Wisconsin and Oregon he was made *ex officio* state auditor. He is still frequently found as *ex officio* member of various boards and commissions. Most of his powers and duties are of a ministerial character. Thus, he is usually keeper of the public records, archives, and the state seal and custodian of public buildings, grounds, and supplies. He authenticates public acts, and is responsible for the publication and distribution of the acts of the legislature and other public documents. Specifically, he is required to countersign and seal all commissions of appointment to public office issued

<sup>9</sup> Idaho Revised Code, Sect. 339; *Seawall v. Gifford*, 22 Ida. 295.

<sup>10</sup> *Melone v. State*, 51 Calif. 549.

by the governor.<sup>11</sup> He usually also has important functions in connection with elections, such as receiving petitions from primary candidates, issuing certificates of nomination and election, and furnishing ballots and other supplies to be used in state elections. He compiles the election returns and publishes a state manual or "blue book."

Other miscellaneous functions which the secretary of state is frequently called upon to perform include the issuance of certificates of incorporation to companies organized under state law, the admission of foreign corporations, and the issuance of licenses to owners and operators of motor vehicles. For the performance of his services in issuing such certificates and licenses, the secretary of state receives fees, the amount of which is fixed by law. In most states he is required to pay the proceeds of such fees into the state treasury, either by a specific constitutional or statutory provision to that effect, or by a provision fixing his salary in full for all his services.<sup>12</sup> On the whole, the office of secretary of state appears to be very loosely and unsystematically organized. It appears that some of his duties, such as those relating to corporations and motor vehicles and the collection of fees, should be transferred to other officers or departments of the state government to which they are more germane.<sup>13</sup>

### Relations of Governor and Heads of Departments

An important question which bears upon the general position of all the heads of state executive departments is that as to the relation in which they stand to the nominal head of the administration, the governor. At the beginning of the history of the older state governments, the governor in some of the states was empowered to appoint heads of executive depart-

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<sup>11</sup> *State v. Barber*, 4 Wyo. 409.

<sup>12</sup> *State v. Lewis*, 6 Idaho 51, construing Constitution of Idaho, Art. IV, Sect. 19.

<sup>13</sup> It is not necessary at this point to consider in detail all of the heads of various state executive departments. Some of them, such as the state superintendent of public instruction, will be considered in connection with that phase of state administration in which they are specially concerned.

ments. This method of selection soon gave way in practically all the states to popular election. In most of the states the older constitutional heads of departments are now generally elected by the people at the same time that the governor is elected. Not only does the governor have little or no control in selecting them, but he has little or no power of direction over them after they have been selected. It is true that the constitution and statutes frequently provide that the governor may request information in writing from them regarding their duties and that they shall make reports to him periodically or upon demand, but he has little power of following this up with any measures of positive control, for he has practically no power of removal, suspension, or discipline over the elective heads of departments. Moreover, he has no power over the organization of the departments. He cannot determine the number of departments, nor assign the various services to be performed to the respective departments, as these matters are regulated by constitutional or statutory provisions.

The term "executive department" is frequently used in a loose sense. Properly, it should be used to designate some fairly large and well-defined division of the state administration, to which are assigned a group of reasonably homogeneous functions. Unfortunately, the state administration is not divided into large and well-defined departments, but is split up into numerous arbitrarily constituted sections. Can there be said, for example, to be a state financial department when duties connected with the finances of the state are divided among the governor, state treasurer, auditor, attorney-general, secretary of state, insurance commissioner, and other officers?

It is evident, therefore, that the state administration is not organized for efficiency through the due subordination of the various ranks of an official hierarchy, but is rather organized for inefficiency on the principle of checks and balances. Although the principal state officers are formed, in some states, into a sort of cabinet to assist the governor, they hardly occupy, as a rule, that close and intimate relation to the governor which the corresponding officers in the National Government occupy



toward the President. The executive power in the states is thus only nominally a unit. In reality, it is split up into as many independent parts as there are heads of departments.<sup>14</sup> In reality, it is as much organized on the collegial principle as the legislature, with the exception that there are usually no regular stated meetings of the executive authorities for deliberation and the formulation of a concerted program, but each acts, in general, separately from the others. It is somewhat as if each member of the legislature were assigned a certain division of the field of legislation in regard to which he was authorized to take action without consultation with the other members, subject only to the provisions of the constitution and laws applicable to him. So each state executive authority wields separately his own share of the executive power without regard to the activities of the other executive authorities, subject only to the constitution and statutes.<sup>15</sup>

### Forms of Control Over the Administration

In order that the executive departments of the state governments shall be even tolerably workable, it is necessary that, by way of compensating for the lack of administrative integration, some other means of control should be supplied.

The different forms of control over the administration which have been evolved may be classed as popular, political, legislative, judicial and administrative. Some of these forms of control may overlap or merge into each other, while some may exist separately and simultaneously. Popular and legislative control are forms of political control, but political control over the administration may also be exercised extra-legally through the political party. The control of the political party over the administration is secured through the successful efforts of a

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<sup>14</sup> Within a given state administrative department, however, the principle of centralization is, as a general rule, followed. Wyman, *Administrative Law*, p. 224. To this general rule, however, there are numerous exceptions, owing principally to administrative insubordination, due to legislative interference in administrative matters. See Cornell v. Irvine, 77 N. Y. 114.

<sup>15</sup> Cf. Barthélemy, *Le rôle du pouvoir exécutif dans les républiques modernes*, pp. 59-61.

particular party organization in controlling the election or appointment of officers to executive and administrative positions. Such control is legitimate in so far as it tends to harmonize the activities of such officers with each other and with the policy-determining organs of the government for the more effective execution of the popular will, but it may have an injurious effect upon administrative efficiency if utilized for the perpetuation of the existence of the party organization.<sup>16</sup>

Popular control over the administration is secured to a limited extent through the rather vague and indefinite influence of public opinion over administrative action. Thus, where public opinion in a certain locality of the state is favorable or opposed to the enforcement of a given state law, the activity or non-activity of the law-enforcing officers is likely to be correspondingly influenced. Such extra-legal influence of public opinion is capable of exertion, however, through the possibility of the exercise by the people of legal and more tangible means of control. The legal methods of popular control over the administration consist in the adoption of constitutions and amendments thereto, the initiative and referendum in ordinary legislation, and in the election to, and recall from, public office.<sup>17</sup> The organization of the executive department and the competence of the executive and administrative authorities are to some extent determined by most of the constitutions. In no case, however, are these matters fully provided for in the constitution. Even if they were so provided for at any given time, the constant growth of administrative functions would cause such a continual need of changes and additions in the administrative organization that constitutional revision could scarcely be expected to keep pace with the new developments. Power to supplement or extend the constitutional provisions regarding the organization and competence of the executive and administrative authorities must therefore be vested either in the legislature or in the higher constitutional officers of the executive department. In the American states the former alternative is adopted. Upon this point the constitutions are usually silent,

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<sup>16</sup> Cf. Goodnow, *Politics and Administration*, p. 37.

<sup>17</sup> On the recall, see above, Chap. V.

but the lodgment of this power in the legislature results from the generally recognized principle that the legislature is a body of residuary powers, while the executive department is largely a body of delegated powers.<sup>18</sup>

Of the legal forms of control over the administration in the American states, that of the legislature is one of the most extensive and pervasive. A large part of the work of the legislature consists in the passage of laws creating new organs and functions in the executive department, or rearranging those already in existence, and giving detailed directions as to the exercise of their powers and duties by the designated organs. Thus, the legislature enters intimately into the business of regulating the administration.

Furthermore, the legislature by joint ballot may in some states appoint officers of the executive department, while in most states the upper branch of the lawmaking body has the power of confirming the appointments of the governor. The legislature may also often prescribe the qualifications for holding executive or administrative offices, may determine the length of the term, and may remove the incumbent from office before the expiration of the term by impeachment, by the abolition of the office, or in some cases by merely declaring the office vacant. Thus, the legislature of Michigan, in providing for the consolidation of the several state institutions, abolished their boards of managers and annulled all appointments of officers at said institutions.<sup>19</sup> Through the control thus exercised over the personnel of the administration, the legislature is enabled to exert an important influence over the carrying on of the administrative services. Of even greater importance, however, in this respect, is the legislative control of the public purse. New organs cannot be created, nor new functions undertaken, nor can the old ones be maintained without provision being made by the legislature for the necessary financial support. Through the medium of detailed appropriations, the legislature is able to exert an influence which permeates every branch of

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<sup>18</sup> *Field v. People*, 3 Ill. 79 (1840).

<sup>19</sup> Michigan Acts of 1891, No. 140; *Attorney-General v. Jochim*, 99 Mich. 358.

the administrative system.<sup>20</sup> It thus appears that, in the several respects mentioned, *viz.*: in providing for the organization and competence of the executive and administrative authorities, in creating and terminating membership in the administration, and in making detailed appropriations for the carrying on of the administrative services, the work of the legislature is not properly legislation but administration. "The legislature thus becomes in a sense the central administrative authority of the state."<sup>21</sup>

The control exercised by the legislature over the administration is to a certain extent legitimate and even necessary in order to secure the requisite harmony of action between these departments of the government. The representatives of the people in the lawmaking body should be in a position to criticize the administration and to prevent or remedy any abuses which may grow up in the conduct of the administration. If, however, legislative control is extended farther than necessary for the accomplishment of these objects, it may exert an injurious influence both upon the legislature and upon the administration. Control by the legislature, though legitimate within limits, should not be extended so far as almost completely to destroy the independent action of the administration, so that the latter becomes a mere tool in the legislative hand. Legislative control is political control, and therefore should be confined to the general features of administration. Statutes should not contain elaborate and detailed administrative provisions, but such details should rather be left to the discretion of the executive. The injection of political considerations in the administration weakens the executive authority and renders the administration inefficient. The injurious effect of political considerations is especially marked when it touches the personnel of the administration. As Woodrow Wilson pointed out many years ago, "Politics sets the tasks for administration; but it should not be suffered to manipulate its offices."<sup>22</sup>

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<sup>20</sup> See, for example, Illinois Session Laws, 1915, pp. 12ff.

<sup>21</sup> Freund, "American Administrative Law," *Political Science Quarterly*, IX, p. 413.

<sup>22</sup> "The Study of Administration," *Political Science Quarterly*, II, p. 210.

Although legislative control over the administration in the American states has been extended to considerable lengths, it cannot in the nature of things entirely displace administrative control. It is impossible for the legislature to foresee and to provide in detail for all emergencies that may arise in the course of administrative action. Moreover, the facts and processes of life in the twentieth century are frequently so complex and technical that the legislature is not well fitted to deal with them. Hence, a certain amount of discretion must be allowed to the administrative authorities in dealing with conditions as they arise. In such matters, for example, as the regulation of railroads and of the working conditions of laborers in factories, purely legislative control has been found to be impracticable in many respects and considerable discretionary power, therefore, has been lodged in the hands of administrative officers and departments. This growth of discretion on the part of administrative officials has, to some extent, released them from the control not only of the legislature but also of the judiciary.<sup>23</sup>

Legislative control is, from its very nature, subject to another serious limitation. The legislature may enact regulations for the guidance of the conduct of the administration, but such regulations do not necessarily result in control over the administration unless some means are provided for seeing that the regulations are carried out. The legislature, partly on account of the character of its organization and partly on account of the fact that it is ordinarily in session only a comparatively small portion of the time, is not well adapted directly to oversee the carrying out of the regulations which it may enact. The lawmaking body, it is true, usually has standing committees to which is assigned some degree of oversight of the executive departments. Special committees of the legislature may also be appointed from time to time to investigate the various branches of the administration, and to bring to light any abuses in the administration or any derelictions of administrative offi-

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<sup>23</sup> Cf. Goodnow, "The Growth of Executive Discretion," *Proceedings of the American Political Science Association*, II, pp. 29-44; *Inaugural Address and First Message of Governor Cox of Ohio, 1913*, p. 19; "Report of New York Factory Commission, 1912," pp. 803-805.

cials. Such committees are sometimes vested with the power to subpoena witnesses and to punish for contempt. The control exercised by the legislature through such committees, however, is, as a rule, special and temporary, rather than regular and permanent.

The most usual means whereby the statutes enacted by the legislature for the control of the administration are carried into effect is through the action of the courts. Through its power of construing and enforcing the acts of the legislature relating to the administration, the judiciary exercises, both in civil and in criminal cases, a very far-reaching control over the competence of administrative officials. It is to be noted, however, that in so far as the jury system is used, an element of popular control is injected into the jurisdiction of the courts.

A further control of the judiciary over the administration arises from the power of the courts to issue extraordinary legal and equitable remedies, such as the mandamus, the injunction, and the quo warranto. These writs are issued, as a rule, only in the discretion of the courts; that is, not as a matter of course, but only when probable cause is shown. They are designed primarily to compel the performance or non-performance on the part of administrative officials of certain acts required or prohibited by law, rather than the imposition of damages or penalties for the violation of law. They are thus essentially anticipatory rather than retrospective in character. It is to be noted however, that the writ of mandamus will not issue to compel officers of the administration to perform acts of a political nature or which involve the exercise of official discretion. This is particularly true in reference to the governor. Many courts hold that, in order to avoid conflict between the judicial and executive departments, the writ of mandamus will not issue to compel the governor to perform even a ministerial act required of him by law.<sup>24</sup>

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<sup>24</sup> See, for example, *People v. Bissell*, 19 Ill. 229; *State v. Governor*, 25 N. J. L. 331; *Rice v. The Governor*, 207 Mass. 577; *People v. Board of State Auditors*, 42 Mich. 422; *Lamar v. Croft*, 53 S. E. 540; *Rice v. Austin*, 19 Minn. 103; but compare *Elliott v. Pardee*, 149 Calif. 516. On the whole matter, see *Michigan Law Review*, III, p. 631.

The duty may be laid upon the secretary of state of countersigning and sealing the commissions of appointments made by the governor. Under these circumstances the question arises as to whether the secretary of state may refuse to countersign and seal a commission because, in his judgment, the governor had no authority to make the appointment. The courts have denied the contention that the secretary of state can exercise any discretion under these circumstances, and have held that the writ of mandamus will lie to compel him to perform a ministerial act, and that he is amenable to injunction when attempting to do what he ought not to do.<sup>25</sup>

It thus appears that the governor may issue commands, but the heads of departments need not obey unless compelled to do so by a court of law. The relation, therefore, between the governor and the heads of departments is not an administrative but a legal relation. This is in direct contrast to the relation which exists between the President of the United States and the members of his Cabinet, and tends very seriously to disintegrate the state administration. It is an unedifying example of the bad effects of the application of the principle of checks and balances in state administration. Nevertheless, it is doubtless better that the governor should be able to exercise some control over the acts of the heads of departments through writs issued by the courts than that he should not be able to exercise any control over them at all. It is to be noted, however, that the interposition of the courts, as thus far spoken of, is confined to the requirement that heads of departments shall perform acts of a *ministerial* character when a legal interrelation exists between the acts of the governor and those required of the head of department.

When the acts of the head of department admittedly involve the exercise of official discretion, the writ of mandamus will not, as a general rule, lie to compel the performance of the act.<sup>26</sup> There is an obvious incongruity involved in the attempt to give

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<sup>25</sup> State *ex rel.* Mo., etc., Co. v. Johnston, 234 Mo. 338.

<sup>26</sup> State *ex rel.* Roshach v. Pratt, 68 Wash. 157, in which it was held that mandamus will not lie to compel the attorney-general to perform the discretionary duty of commencing legal actions.

the governor the power to control the discretionary acts of a head of department whom he has not appointed and cannot remove. The governor cannot exercise a real control over the state administrative officers through a mere legal power of direction, capable of being enforced only through appeal to the courts. Such control by the governor cannot be fully introduced except by granting to him the power of appointment, combined with that of discipline, suspension or removal.

Administrative control over the performance of administrative work would be more conducive to efficiency of action than judicial control. The latter method of control aims primarily at the protection of private rights against encroachment on the part of administrative officials, while the former is more concerned with the promotion of the social welfare through the increased efficiency of the administration. If efficiency of administrative action is adopted as the primary object to be secured, then it must be admitted that administrative control over the administration is more effective for this purpose than either judicial or legislative control.

Administrative control over the administration has been a slow growth in the American states, and is even yet in a rudimentary stage of development. Such a method of control, if fully developed, would require that the administration be organized in hierarchical form with a definite head to whom the other administrative officials should be subordinate, not merely in name or theory, but in reality. This graduated subordination would be secured in part through the power of each superior officer to select his subordinates. Inasmuch, however, as appointment in itself is an imperfect form of administrative control, there should be vested in the superior officer the power of removal and, occasionally, the power of discipline. Such an administrative system is that which has sometimes been described as "a government of men and not of laws," for the subordinate officers would be directed in the performance of their detailed duties, not by the laws enacted by the legislature, but by the orders of their superior officers. This system would not necessarily do away with popular control, for the head of the administration would still be elected by popular vote and might also



be subject to the popular recall. It would merely relieve the voters from the need for attempting to exercise what is in reality an administrative power, *vis.*, the election of a large number of subordinate, non-policy-determining officials. The release from the need of performing this function would probably increase the degree of control exercised by the people over the administration.<sup>27</sup>

Such considerations, however, have had little influence in determining the actual character of the administrative organization in the American states. The hierarchical method of organization was considered as incompatible with our democratic institutions and as savoring too much of European monarchical systems, from which we desired to escape. Our democratic institutions had been set up as a result of a reaction from the excessive growth and domineering character of executive authority. This reaction was accompanied by the feeling that the methods and forms which had made the executive authority strong and efficient should be strictly avoided. This feeling is shown in the provision of the Massachusetts bill of rights of 1780 that "this government shall be a government of laws and not of men."<sup>28</sup> The king in monarchical countries had been able to direct the administrative officers in individual instances, but the people as a mass, it was felt, could not do this. Therefore their control over the administrative officers must be exercised largely through elections and through the adoption of organic laws and the passage by their representatives of statutes to which alone such administrative officers should be accountable. Thus, as Woodrow Wilson puts it, "The appointment of officials was discredited among us; election everywhere took its place. We made no hierarchy of officials. We made laws—laws for the selectmen, laws for the sheriff, laws for the county commissioners, laws for the district attorney, laws for each official from the bailiff to governor—and bade

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<sup>27</sup> Cf. Ford: "Politics and Administration," *Annals of the American Academy of Political and Social Science*, XVI, pp. 184-187.

<sup>28</sup> Thorpe, *Charters, Constitutions and Organic Laws*, p. 1893. On the distinction between a government of laws and one of men, see Aristotle, *Politics*, Bk. III, Chap. 16.

the courts see to their enforcement; but we did not subordinate one official to another. No man was commanded from the capital as if he were the servant of officials rather than of the people. Authority was put into commission and distributed piecemeal; nowhere gathered or organized into a single commanding force. Oversight and concentration were omitted from the system. . . . We printed the SELF large and the *government* small in almost every administrative arrangement we made." <sup>29</sup>

The Anglo-Saxon principle of local self-government, made possible in England on account of her insular position and subsequently transplanted to our soil, has resulted in the largely decentralized type of administration in the American states. The doctrine and practice of legislative control and interference in administrative matters has tended to deprive the administration in the states of that independence from political control which is necessary to efficient action. Thus, the administrative system of the states is ground between the upper and nether millstones of legislative centralization and administrative decentralization. The excessive scope of legislative control over the administration at the expense of administrative control is also largely responsible for the disintegration of the administration and the lack of unity, coherence, and concentration in its organization. For thereby the allegiance of each administrative officer is to the law and not to his administrative superior. Herein is seen also the influence of the doctrine of checks and balances operating within the executive department itself. The effects of the endeavor by the framers of the American constitutions to prevent the government from becoming so strong and efficient in action as to endanger private rights and individual liberties are still observable in the present organization of the administration in the American states. Tendencies in the opposite direction have not yet developed far enough to eradicate this fundamental characteristic of the state administrative system.

The leading characteristics of the administrative system of the American states, noticed above, are sufficient to differentiate

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<sup>29</sup> "Democracy and Efficiency," *Atlantic Monthly*, LXXXVII, pp. 295, 296.

it from the systems both of the American National Government and from those of the leading European governments. The character of any particular administrative system is determined by its environment, that is, by the totality of the social, economic, and political forces and historical traditions which exert an influence upon it. The social necessity of administration legitimizes its existence, but also determines the extent of its province.<sup>30</sup> No administrative system is at any given time perfectly adapted to this environment, but is in a continual process of becoming more closely adapted to it. Thus, the character of an administrative system is always changing, more or less rapidly, in order to become better adapted to the ever-changing environment. The general type to which a particular system belongs, however, is nevertheless capable of fairly accurate determination. The administrative organization will be bound to be more or less advanced in type, largely according to the importance and complexity of the functions performed by it. The administrative system found in the American National Government has diverged from the type found in the states, partly on account of the extent of the President's power of removal, partly on account of the greater scope and magnitude of the functions performed by the National Government, and partly on account of the fewer direct points of contact between that government and the individual citizen. The principal European countries have developed an efficient type of administrative organization largely on account of the external pressure of powerful neighbors. With them, local self-government and private rights, however desirable theoretically, could not be allowed to stand in the way of national safety. In the case of an administrative system where no such external pressure exists, either because of geographical isolation or because the state is merely a subordinate part of a larger state, the administrative system need not be so highly or efficiently organized. The fact, therefore, that the American states are merely component parts of a larger state materially affects the char-

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<sup>30</sup> Address of M. Cooreman before the First International Congress on the Administrative Sciences, *Rapports et comptes rendus du congrès*, V, Part II, p. 6.

acter of their administrative systems. Thus, certain important functions, such as the carrying on of foreign relations and protection from foreign invasion, are taken care of by the National Government to the practical exclusion of the states. Again, the subordinate position of the states has made local self-government and decentralization possible because a high degree of administrative efficiency has not been found necessary to state life. The functions to be performed by the state governments have hitherto been of relatively slight magnitude or complexity. But this condition is gradually changing, and, as it changes, the decentralized and disintegrated administrative system in the states is found to be more and more inadequate to meet the exigencies of the new order. The administrative functions which modern conditions require that the American states shall undertake are of such increasing extent, variety and complexity that the states can scarcely afford longer to remain without a more unified, concentrated and efficient type of administrative organization.

### State Officers, Boards, and Commissions <sup>31</sup>

It has long been the practice of state legislatures to appoint special or standing committees, composed of their own members, to consider matters connected with particular phases of possible legislation. From them have sprung certain types of the executive boards and commissions, which have become such a prominent feature of state administration today. "The shortness of legislative sessions in most states, and the lack of expert knowledge and of necessary leisure on the part of the legislators themselves, sometimes led them to establish a committee or commission composed of outsiders possessing special knowledge

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<sup>31</sup> The terms "board" and "commission" are frequently used interchangeably, but a distinction should properly be made between them. By a board is meant a body of laymen whose function is merely advisory or supervisory. They give only a part of their time to the work and merely supervise the subordinate officers in charge of the actual administration. A commission is a body composed of men to whom is intrusted the actual work of administration and they generally give their whole time to it. Some branches of state administrative work are placed under neither a board nor commission, but under a single commissioner, or director as he is sometimes called.

of the subject, and able to give their whole attention to the matter in hand."<sup>31a</sup>

At the beginning of the history of the states and for a considerable part of the nineteenth century, the administrative activities of the states were generally so circumscribed as to require few agencies outside of the existing state officers or heads of departments. Much of what has since become state administrative activity was then performed, if at all, by local agencies. State administrative control or supervision over many matters formerly left to the control of local authorities has been brought about, first, by the direct assumption of a former local function by the state; secondly, by establishing central administrative supervision over the local administrative authorities and over the exercise by them of administrative functions. The influence of state-wide public opinion upon the activities of local officers may also be increased through the publicity arising from investigations of local administration and reports made by state agencies. In addition, many new functions not formerly performed at all have been undertaken by the states. The assumption by the state of each successive new function has, as a rule, involved the creation of a state executive or administrative board, commission, commissioner or other similar agency, to which is intrusted the direct exercise of the function. The creation of state boards and commissions, therefore, has gone hand in hand with the development of centralization in state administration.<sup>32</sup> In general, such bodies may be considered as administrative agencies created for the special purpose of enforcing or supervising the enforcement of a particular portion of the substantive law of the state.<sup>33</sup>

The creation of state boards and commissions began in

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<sup>31a</sup> F. H. White, "The Growth and Future of State Boards and Commissions," *Political Science Quarterly*, XVIII, p. 631

<sup>32</sup> "Centralization" is here used in the special sense of state control over activities previously under local control, rather than of concentration of authority over state functions in one organ of the state government

<sup>33</sup> On the function of state boards and commissions in enforcing state law, see below, Chap. XVII.

earnest shortly after the close of the Civil War, and was largely due to the development of new conditions in the states at that period. The increasing complexity of modern social and industrial conditions, the coming into existence of new and unplumbed phenomena, and the awakening sense of social solidarity, involved more and more the interference of the state for the purpose of regulating the operations of business and the processes of life. Such matters cannot be satisfactorily regulated by legislative action, and administrative control has therefore been provided.<sup>84</sup> The creation of state administrative agencies in the form of boards and commissions secures the advantages of specialization in public affairs and the application of technical knowledge and skill to the regulation of complex social and industrial conditions. The movement for the creation of state boards and commissions therefore rests fundamentally upon sound principle. It must be admitted, however, that, in practice, the movement has gone too far. It has sometimes been perverted for partisan purposes. Undoubtedly, in many instances, new boards and commissions have been created primarily for the purpose of supplying new offices to be filled as rewards for party services, and where such offices carry substantial salaries or official fees, they are eagerly sought after by decayed politicians and "lame ducks."<sup>85</sup>

The number of state boards and commissions is continually on the increase, and scarcely a legislature meets without creating several new bodies of this kind. During the first decade of the present century, the increase in the number of such bodies averaged between one hundred and two hundred annually. The expenditures of the state government have increased hand in hand with the increase of state boards. Much of this increase has of course been due to the general rise of prices and the consequent increasing cost of carrying on governmental operations. It has also been due in part to the assumption by the

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<sup>84</sup> The constitutional prohibition of special acts by state legislatures has possibly operated as one cause to accelerate the increase of boards and commissions, for the rules, regulations and special orders issued by the latter may, to some extent, take the place of special legislative acts.

<sup>85</sup> Cf. Message of Gov. Baldwin of Connecticut, 1911, *Conn. Senate Journal*, 1911, p. 41

state of expenditures for new purposes, such as increased state aid to education, charitable administration, and the promotion of good roads. There has been a growing feeling, however, that much of this increased cost of running the state government has been due to the increase of state boards, the cumbrousness and duplication of governmental machinery, and uneconomical methods of discharging public functions.

### Powers of Boards and Commissions

The range of subjects which have been brought under the administrative control or supervision of state boards is extremely wide. Among the more important matters may be mentioned revenue and taxation, charities and correctional institutions, education, public health, corporations, such as railroads, public utilities, banking and insurance, agriculture and the conservation of natural resources, public works, labor, and the civil service. The larger number of boards have to do with economic, developmental and regulative functions. The increasing complexity of industrial relations has made especially numerous within recent years the boards created for the purpose of dealing with labor matters, such as minimum wage boards, industrial commissions, and state accident commissions in connection with employers' liability and workmen's compensation laws.

The extent of the powers exercised by state boards and commissions varies widely. In some cases they are purely advisory, merely exercising the power of investigating and recommending, without authority to carry their recommendations into effect. All gradations of power are found between this condition and the other extreme in which the state board may, as in the case of some public utility commissions, issue mandatory orders which it has the power to enforce, or, as in the case of some state boards of health, may make regulations which enter into the details of local sanitary conditions in all parts of the state.

The issuance of such rules and regulations by state boards, or the making of rates by public utility and railroad commissions, constitutes in reality the exercise of a subsidiary legislative power. State boards and commissions may also sometimes

exercise quasi-judicial powers. Thus, in conducting hearings and inquiries, the board or quasi-judicial tribunal may be empowered to administer oaths, subpoena and examine witnesses, and issue subpoenas *duces tecum*, requiring the production of books and papers. In the main, however, the powers of state boards and commissions are administrative in character. They are primarily administrative bodies, and are therefore not hampered by the technical rules of judicial procedure. This comparative freedom from the procedural limitations which hedge about the courts makes for efficiency and promptness in administrative action. Conclusiveness of administrative determinations by state boards and commissions, however, is seldom found. In order to safeguard private rights from encroachment through arbitrary administrative action, it has usually been deemed necessary that any such action should be subject to judicial review.<sup>36</sup> The constitutional requirement of due process of law and the principle of separation of powers have been the grounds of many court decisions holding invalid acts of the legislature conferring board powers upon administrative bodies. In order to avoid the danger of unconstitutionality, some states have placed in their constitutions provisions conferring powers of a quasi-legislative or judicial character upon important commissions. Even the courts, however, are more and more recognizing the fact that the promotion of the social welfare often requires a considerable scope of administrative action. Even when court action becomes necessary the scope of judicial review may in various ways be narrowed and that of administrative action correspondingly broadened. Thus, the courts usually decline to substitute their judgment for that of the state board in the determination of questions of public policy.<sup>37</sup> Moreover, judicial review may have to do merely with the methods whereby the determination of the board was reached and not with the subject matter of the determination.<sup>38</sup> Furthermore, it may be provided that no court appeal shall be allowed from the finding

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<sup>36</sup> Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 418.

<sup>37</sup> Public Service Gas Co. v. State Board of Public Utility Commissioners, 84 N. J. L. 463.

<sup>38</sup> California Acts of 1913, Chap. 324.



of the board upon any question of fact.<sup>39</sup> The scope of administrative action of a state board may also be virtually widened through the provision making it unnecessary that such board should bring prosecutions to secure compliance with the law or punish violations of it, but empowering the board to enter and enforce directly an order, which becomes the final determination of the matter unless the person against whom the order is entered appeals from such order to the proper court. In order to afford a greater degree of conclusiveness to administrative determinations while retaining a reasonable safeguard against arbitrary administrative action, it has been suggested that an appeal from the decision of such a body as a state railroad commission should be allowed only when the decision appealed from is not a unanimous one.<sup>40</sup>

On the side of internal organization, state boards and commissions have as yet been granted comparatively slight power. Although the boards, or their executive officers, usually have the power of appointing the administrative personnel or expert staff attached to the board, subject in some states to civil service regulations, the number of persons in the staff, the grade or rank of each, and the amount of their compensation are matters which are usually determined by the legislature. Legislative control over boards and commissions comes about both through the general power of the legislature to create and organize such bodies and also through its power of making appropriations for the running of the state government in all its branches. Legislative appropriations for the maintenance of the executive departments, boards and commissions frequently go into great detail, specifying not only the exact salaries of each member of the staff, but also the exact sums that may be spent for each particular article that may be purchased, or for each particular class of expenditure permitted, or even for each individual item of expense that may be incurred.

It is possible, however, to discern evidences of a tendency to give state administrative agencies greater control over their

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<sup>39</sup> *Stettler v. O'Hara*, 139 Pac. 743.

<sup>40</sup> Message of Gov. Baldwin of Connecticut, 1911, *Conn. Senate Journal*, 1911, p. 54.

internal organization. The legislature, for example, sometimes makes a lump sum appropriation for salaries and expenses, or, if the appropriations are itemized, authority is given the commission to transfer funds from one to another department of its work as need may arise. Administrative control over such matters is undoubtedly an advance over complete legislative control, but, in the case of some matters, such as the fixation of salaries and hours of labor of the employees of state commissions, it is probable that, for the sake of uniformity, this function should be intrusted to a distinct administrative body.

### Boards v. Single Commissioners

The determination of the question as to whether the function to be performed shall be intrusted to a board or to a single commissioner depends, of course, upon the provisions of the constitution or statute creating the administrative agency. In the organization of the large majority of state administrative agencies, the board system has been adopted. At bottom, the prevalence of this system is probably due in large measure to a traditional fear of one-man power. Various other reasons, however, have undoubtedly actuated legislative bodies in adopting this plan. As many administrative agencies have been created for the purpose of supplying offices to be filled by party henchmen, a board was naturally preferable from this point of view, as it furnished a larger number of offices to be filled. Frequently, it is provided in the law that no more than a majority of the board shall be composed of members of the same political party. Ostensibly, the object of this provision is to give an appearance of nonpartisanship to the board, but, in reality, it tends to facilitate the workings of a bipartisan combination for the distribution of the offices at the disposal of the board. It has also been observed that the device of bipartisan representation "enables those boards to be particularly successful in securing large appropriations, . . . and also enables them without great difficulty to thwart any threatened investigation," for the "washing of dirty linen" in public would be equally injurious to the interests of both parties. Sometimes the board system has been employed, not only to give represen-

tation to different political parties, but also to give representation to different sections of the state, to different economic interests, or to different religious sects. The entrance of such considerations, however, into the determination of the personnel of the board does not usually make for administrative efficiency but rather against it.

Although it is generally recognized that boards and commissions are unsuitable for administrative work, since they tend toward inefficiency and diffusion of responsibility, something may, under certain circumstances, be said in their favor. They are more suitable than single commissioners for the performance of advisory, quasi-legislative, or quasi-judicial functions, because in such matters consultation and deliberation are desirable. Moreover, it may sometimes happen that a board, on account of its diffused responsibility, may be more energetic in carrying out an advanced and enlightened, but unpopular, policy than a single commissioner could ordinarily be expected to be. Furthermore, through the device of gradual renewal of its membership, a board may usually be expected to pursue a more continuous policy than a single commissioner, unless the latter serves for a very long term or is regularly reappointed at the end of his term. The possibility of a continuous policy, however, is not necessarily an advantage, for the policy pursued should not be so continuous as to prevent the infiltration of new ideas and the adoption of new and advanced methods. Moreover, the device of gradual renewal of the membership of a board may prevent the governor or the appointing authority from exercising that degree of control over its policy which should belong to him, and which he might exercise more effectively in the case of a single commissioner.

On the whole, if a choice must be made between the board and the single commissioner, the latter is, in most cases, decidedly to be preferred. The disadvantages of the board as compared with the single commissioner may be summarized as follows:<sup>41</sup> (a) boards are frequently composed, at least in part, of *ex officio* members, who cannot be expected to give their

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<sup>41</sup> Cf. L. A. Blue, in *Annals of the American Academy of Political and Social Science*, XVIII, p. 434ff.

whole attention to the work of the board; (b) where an effort is made to give representation to different sections of the state, it is difficult to get all the members together and meetings of the board are apt to be held only at infrequent intervals; (c) even when meetings are held, a board shows the weakness of a deliberative body in being unable to reach prompt decisions; (d) unless adequate salaries are paid the members of the board, they cannot usually be expected to give their whole time to the work, whereas, if adequate salaries are paid, this item of expense would be much greater than in the case of the single-headed department; and (e) responsibility for its actions in the case of a board is diffused over a group instead of being concentrated on one man as in the case of the single commissioner.

It is not necessary, however, for us to come to a definite decision as to the respective merits of the two plans. In any particular case, the determination of this question would depend largely on the character of the work intrusted to the administrative agency. In most cases, a combination of these two kinds of agencies would probably be more effective in securing the ends in view. Even where the function is intrusted to a board or commission, the control is likely to gravitate into the hands of one member, who, by reason of special knowledge or personality, dominates the body. As a matter of fact, it often happens that, although a board is legally and ostensibly in charge of a given function, the actual discharge of the function is largely in the hands of a single officer, who serves as the secretary or executive officer of the board.

Where the combination plan of both board and single executive officer in charge of a given function is legally and ostensibly adopted, the question arises as to what relation should be set up between the two agencies and where the line of division should be drawn between their respective powers. Although these questions can frequently be answered intelligently only in the light of the special circumstances of a particular case, it may be said in general that the working and action of the executive department is likely to be less efficient in proportion to the extent to which the executive officer is subject to the

control of the board in the performance of executive duties. The executive officer should, in general, be intrusted with entire control of the executive or administrative matters connected with the department, subject only to the possibility of removal from office at stated intervals, for good and sufficient cause, by more than a mere majority of the board. He should also be appointed either by the board or by the governor. In matters requiring deliberation and the interchange of opinions and views, the participation, if not control, of the board is desirable. The moral support and aid through advice and encouragement which an able and progressive, but not meddling or overbearing, board may give to the executive officer cannot be wisely dispensed with. But the actual management and direction of the affairs of the department should be largely in the hands of the executive officer.

### State Administrative Disintegration

The administrative organization which has resulted from the practice of creating numerous state boards and commissions shows a lack of conscious development and of systematic planning. Endless incongruities and absurdities and lack of coördination are the natural result. The administration of the states' business has been divided into small and arbitrarily limited compartments, each under a separate board, exercising its powers with little or no reference to the activities of other boards charged with the supervision of closely related matters. The slight regard paid in the creation of such boards to their proper interrelation with existing agencies has tended to produce conflicts of authority not only as between the state commissions themselves but also as between state commissions and local agencies, departments or boards. Some matters may escape regulation entirely either through conflicts of authority arising from the overlapping jurisdictions of different administrative agencies or because such matters fall in a "twilight zone" between the vaguely defined jurisdictions of such agencies. Thus, the inspection of factories, sweatshops and bakeries in cities may fall within the province of both the state and municipal departments of labor and of public health. In such cases, care-

ful coöperation is essential to adequate regulation. But if such matters escape regulation, it is difficult to assess and fix the blame.<sup>42</sup>

Moreover, in the conduct of their affairs, such boards are frequently practically irresponsible inasmuch as they are subject to but slight central supervision or control by state executive authorities. It is true that, while some state boards are elective by popular vote, most of them are appointive by the governor with the advice and consent of the senate. As has been pointed out, however, the practice of providing for gradual renewal of the membership may make it impossible for a governor to appoint a majority of the board during his term of office, especially when, as not infrequently happens, his own term is shorter than those of the board members. Not only is little or no attempt made to coördinate the terms of board members with that of the governor, but the latter's power of removal of such officers is usually so restricted that it is capable of exercise only in extreme cases. The result is that, as has been frequently remarked, they practically constitute a fourth department of the state government, and bring about a serious disintegration in the administration of the state business.

### The State Civil Service

The state civil service comprises all officers and employees of the state except those engaged in the military or naval forces. Of the two principal methods of selecting such officers and employees, those of election and appointment, the former places the real selection of subordinate officers in the hands of the party machine. Hence, when unwise selections are made by the method of popular election, the people have no one but themselves to blame, for there is no one upon whom the responsibility may be officially placed. It is not the people who are at fault, but the system. It is impracticable for subordinate administrative officials to be selected by the people upon the basis of approved tests of fitness for the office, for the people lack the information upon which to base an intelligent judgment

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<sup>42</sup> Cf. *Report of New York Factory Commission*, 1912, pp. 36, 37, 78.

of their qualifications. Moreover, they are confined in their choice to two or more candidates who have been nominated, or selected as candidates, by the party machines upon the basis of service to the party rather than upon that of fitness for the office. Hence, the method of election by the people of all except the principal policy-determining officers is lacking in that power of discrimination, upon which any system of selection on the ground of fitness must be based. In the case of the principal policy-determining officers, or, at least, in that of the head of the administration, political control through popular election is necessary in order to insure democratic government, but, in the case of the subordinate ministerial officers and employees, the attempt to apply political control through popular election fails for the reason that such nominally elective officers are in reality appointed by the dominant party machine or by a bipartisan combination of political "experts." This leads to the demoralization of the spoils system. The introduction of the short ballot, therefore, is a necessary preliminary to the full introduction of the merit system of selection in the state civil service.

The mere introduction of the short ballot in the state government, however, will not in itself, of course, insure the introduction or maintenance of the merit system of selection. The method of appointment, which, under the short ballot plan, would displace that of election, would, particularly if combined with the power of removal, be conducive to that administrative efficiency which is one of the aims of the merit system of selection. This result could be expected, however, only on the condition that such powers of appointment and removal are exercised by an administrative superior who acts under a due sense of responsibility, not to any party machine, but to the people as a whole. In the absence of such a condition, the method of appointment by an administrative superior, however much to be preferred in other respects to that of popular election, may also lead to the evils of the spoils system.

During the first half of the nineteenth century, the spoils system in the United States rose to its height. This was due in large measure to the dominance of those principles which were supposed to be necessary to the maintenance of real democ-

racy, *vis.*, that as many officers as possible should be elective, and that there should be short terms or rotation in office, in order to prevent the establishment of a bureaucracy, or office-holding aristocracy, out of touch with the common people. This, in turn, was based on the idea that any man of ordinary ability is capable of filling a public office satisfactorily, or, in other words, that no special training for public service is necessary.

As long as the tasks of government were comparatively simple, the principle of rotation in office did not, perhaps, cause serious injury. But with the assumption since the Civil War of many new economic, regulative, and semi-scientific functions, the public business has become more intricate and there has developed a corresponding need for trained men in government service—men with technical knowledge and scientific skill. Economy and efficiency in the administration of the state government cannot now be secured without trained and competent men in the civil service; and the gradually increasing extent of the functions performed by the state government render it continually more important that the merit system of securing public servants should be extended into all branches of the public service where it is feasible. The number of officers and employees in the various services, national, state, and local, has greatly increased,<sup>43</sup> thus increasing the possibilities both for good and for evil involved in their selection. If there is to be a clean sweep of the purely subordinate and ministerial offices at every change of party control, it will be impossible to secure or retain the requisite training and experience in office. There is no Democratic or Republican way of building highways, inspecting factories, or maintaining the public health. Yet the efficiency of the work in the state highway, factory, and health departments has frequently been endangered through the efforts of politicians to control positions in such departments. "We see, for example, a position dealing with engineering problems filled by an ex-bartender with only a grammar school education,

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<sup>43</sup> In several of the larger states, there are 10,000 or more state officers and employees, the number in New York state running to about 22,000. In New York City there are over 75,000 and in Chicago about 30,000.



whose only engineering experience is engineering the campaign" of the officer who appointed him.<sup>44</sup> It has long been unconstitutional in time of peace to quarter troops on private individuals without their consent; but the party machine, held together by the "cohesive power of the public plunder," regularly pays its political debts by quartering its henchmen on the long-suffering taxpayers.

The realization of these evils has led, since the Civil War, to a long struggle between the reformers and the politicians over the introduction of the merit system in the selection of public servants. The agitation has been principally in respect to the Federal service, and it was there that the reformers won their first victory. This has been due in part to the greater scope and complexity of Federal functions and to the greater number of officers and employees in the Federal service, and also, perhaps, in part to the fact that the President's power of removal has been more complete and untrammelled than that of the state governor. The Pendleton Civil Service Reform Act, passed by Congress in 1883, has served in many respects as a model for the state laws subsequently passed. State legislation on the subject may be divided into three periods, the first following immediately upon the passage of the Federal law, and being signalized by the passage of the New York law of 1883 and that of Massachusetts in the following year. A period of comparative inactivity then ensued until 1905, since when similar laws have been enacted in a number of states, beginning with Wisconsin and Illinois in 1905, followed by Colorado in 1907 and New Jersey in 1908. In 1911 the Illinois law, which had previously applied only to appointments in the state charitable institutions, was extended to practically the whole state service, and, in the following year, the Colorado law was similarly extended. In 1913, civil service statutes were enacted in Connecticut, California, and Ohio, while, in 1915, Kansas became the tenth state with such a law on her statute books.

The third period in the history of civil service reform, from 1915 to date, has been marked by a reaction and even back-

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<sup>44</sup> Richard Henry Dana, in *Proceedings of the National Civil Service Reform League*, 1914, p. 80.

sliding in some parts of the country, opponents of the reform making determined efforts in a number of state legislatures to repeal or weaken the civil service laws. They were most successful in Connecticut, where the law was amended so as to make its enforcement practically optional with the heads of departments, and later, in 1921, repealed. The only conspicuous advance made during this period was the adoption of civil service reform by Maryland in 1920. It thus appears that the reform has been adopted in less than one-fourth of the states,<sup>45</sup> and the fight cannot confidently be said to be fully won even in those few states.<sup>46</sup> In some of them it rests on constitutional provision, but in others on a mere statutory basis.

Such ups and downs are to be expected in carrying through any reform which arouses the hostility of powerful interests. Changes in the civil service laws are likely to be more frequent just before and after a change in the party control of the legislature. Even in the positive enactment of civil service laws, partisan considerations frequently enter through the insertion of so-called "blanket clauses," designed to protect the employees then in the service. The civil service laws do not embody the merit principle perfectly, inasmuch as various provisions which work against the perfect application of the principle have been inserted by way of compromise with the open opponents of such measures and with those who seek the appearance of catering to the popular demand for civil service reform, but who are in reality opposed to it.

Although, as previously pointed out, the Federal civil service law has served as a model for the state laws, nevertheless the centralized character of Federal administration, as contrasted with the decentralization in state administration, has produced a difference with respect to the relation of the civil service commission to the head or nominal head of the administration. In the Federal Government, the commission acts more or less under the direction of the President, while in the states the commission

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<sup>45</sup> It has been adopted, however, in over three hundred cities.

<sup>46</sup> In Kansas, for example, the commission practically ceased to function after 1920 on account of the failure of the legislature to appropriate for its support.

is largely independent of the governor in administering the civil service law. The state laws also differ among themselves in respect to the amount of discretion left to the commission. In some states, the laws are brief, thus leaving many details to be governed by the rules of the commission, while other laws are more elaborately detailed in character, thus leaving less to the discretion of the commission.<sup>47</sup>

The civil service laws sometimes relate merely to employees in the state service and sometimes to both state and local employees. In the latter case, two plans of organization are found. In the first place, the administration of the law as applied to both state and local employees may be concentrated in one commission. Cities may be required by law to come under this central commission or may be given the option of doing so by a vote of the city electorate. In the second place, the state commission may deal with state employees only, while separate commissions may be established for each city, or even each county, which elects to come under the law. Where separate local commissions are found, they may be placed under a certain degree of supervision exercised by the state commission, but sometimes they operate independently and without state supervision. Except in the case of the larger cities, it is doubtful whether the advantages of a separate commission are worth the additional expense involved in this duplication of machinery. On the other hand, the direct administration of city civil service regulations by the state commission would probably lead not only to greater harmony in the operation of the civil service laws, but also would probably reduce the influence of local factors opposed to the vigorous enforcement of the merit system.

The classified service, as that term is ordinarily understood, includes all positions in the civil service except those which are exempt from the operation of the merit system. In theory, only those positions should be exempt whose holders exercise policy-determining powers, but in fact the exempt class includes many that are not policy-determining. The method of

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<sup>47</sup> For details of state civil service laws, see J. M. Mathews, *Principles of American State Administration*, pp. 196-210.

making exemptions is either elastic or inelastic, *i.e.*, exemptions are made either by the civil service commission or by provision of the statute as passed by the legislature. This seems to be properly an administrative function, but unless the commission is imbued with the spirit of the merit principle and is supported by an intelligent and aroused public opinion, its power to make exemptions may lead to raids on the service in the interest of spoils politics. On the other hand, exemptions made in the law may also be due to political influences rather than strictly in accordance with the merit principle. On the same basis stand provisions frequently found in the laws giving preference to veterans of the various wars, and sometimes also to other classes of persons.<sup>48</sup>

Positions in the classified service are filled as the result of open competitive examinations, or, in some cases, non-competitive or qualifying examinations. The names of the successful examinees go on the eligible list, from which names are certified to the superior administrative officer in case of a vacancy. Usually the highest three names are certified, but sometimes the one highest name is certified. Naturally, the latter plan leaves no discretion in the appointing officer. The appointee usually goes through a preliminary period of probation, during which he is subject to suspension or dismissal without the usual formalities. Provision is sometimes made for regulating promotions within the service on the basis of efficiency records or promotional examinations. Promotions are now frequently hindered because the service is clogged with superannuated employees who have outlived their usefulness. The service could be made more attractive for younger and more efficient men if the higher places were more readily opened up through an adequate system of retirement allowances for superannuated employees.<sup>49</sup>

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<sup>48</sup> By a New York statute of 1920, it was provided that preference should be given to veterans of the World War, but the act was declared void as in conflict with the constitutional provision giving preference to veterans of the Civil War. *Barthelmess v. Cukor*, 132 N. E. 140 (1921).

<sup>49</sup> Such systems have been adopted in a few states. See P. Studensky, "Pensions in Public Employment," *National Municipal Review*, April, 1922, p. 115.

In the early laws, there were generally no restrictions upon the removal of civil service employees except that they were not removable for partisan reasons. There has been an increasing tendency, however, to place greater restrictions upon the power of removal. Thus, it is sometimes required that removals shall be made only for cause and after a hearing, that notice of the removal shall be filed with the commission, which, either on complaint of the employee removed, or on its own initiative, may investigate the case and order a reinstatement if the removal was made for improper or illegal reasons. It may be questioned whether the restrictions on removal have not gone too far in tying the hands of the superior administrative officers. Usually, the only improper motive for making a removal is to make a place for a personal favorite or political henchman of the superior officer, but if the vacancy thus created can be filled only by competitive examination, this motive for making removals is naturally weakened if not entirely eliminated. It would seem to be a sufficient restriction upon the power of removal to require that the superior officer notify the employee of his removal in a statement giving the reasons therefor, and that the employee removed be given the opportunity to make a written reply, and appeal from the order of removal to the head of the department.

Civil service regulations constitute a species of reform which has grown up with special reference to the particular conditions of American politics. It is a movement to abolish special privilege in securing positions in the public service, and hence is in the direction of democracy. It also aims to secure efficiency in administration by requiring special training for public service, and by creating a body of administrative officials free from the control of party politics. In attempting to free the administrative personnel from partisan control, however, the civil service reformers have sometimes gone too far in depriving department heads of proper and adequate administrative control over their subordinates, upon whom they are dependent for performing the work of the department. The principle upon which civil service laws are based is essentially that of promoting the general welfare as contradistinguished from

the protection of individual rights. Where restrictions upon removal are so rigid as to prevent the discharge of lax or indifferent employees, such restrictions really operate for the protection of the individual incumbent of the position rather than for the public interests. In the present state of partisan politics and administrative disintegration, strict civil service regulations for the larger part of the administrative personnel are doubtless desirable and necessary. But it should be recognized that, in so far as such regulations violate the principle of administrative responsibility of subordinate to superior officer, they should eventually be modified. Such a modification on any considerable scale, however, should await a reorganization of state administration along lines of greater concentration of authority and responsibility.

The selection and composition of the agency created to administer the civil service laws is a matter of importance. This agency is usually a board or commission of three persons appointed by the governor. The law generally prohibits more than a bare majority of the members from being affiliated with the same political party. This provision, however, does not necessarily make the commission nonpartisan, but is more likely to make it bipartisan. Although the commission should administer the law in a nonpartisan manner, it does not seem advisable to free it entirely from political control, in the better sense of the word political. It seems preferable that the commission should be composed not of employment experts, but rather of men of affairs, who could employ such examiners and other experts as the work of the commission might require.

It may be questioned whether the uniform practice of establishing boards or commissions at the head of the administration of state civil service laws is the best arrangement. The New Jersey Efficiency and Economy Commission has recommended that the law of that state be changed by replacing the four members of the state civil service commission with a department of civil service, composed of one head and three assistants. Massachusetts established a single-headed commission in 1919, and the following year Maryland adopted the same

plan.<sup>50</sup> This plan of organization is more efficient for the performance of administrative work, but civil service commissions also have quasi-legislative and quasi-judicial functions to perform, and for such functions a commission is more suitable. Through the device of overlapping terms, a commission may also, as a rule, maintain a more continuous policy. In states having commissions, a single officer may be, and generally is, appointed to perform the administrative work. The Massachusetts plan provides for two associate commissioners to act with the head commissioner in the performance of quasi-legislative and quasi-judicial functions.

One difficulty in the administration of the civil service laws has arisen from the frequent lack of understanding and co-operation between the civil service commission and the heads of departments in which members of the classified service are employed. An attempt has been made to overcome this difficulty in the method of constituting the examining boards for admission to the United States consular service and to secretaryships of embassy or legation. Such boards are composed of two elements, first, officials of the department in which the consuls or secretaries are to serve, and, secondly, a representative of the United States Civil Service Commission. The question may be raised whether a plan worked out on similar lines might not bring about greater coöperation in the administration of the state civil service.

Another form of coöperation which should be promoted is that between superiors and employees, which may be expected to bring about a better understanding and *esprit de corps* in public work, just as it has in private industry. The civil service commission, moreover, should not be content merely with recruiting for public service, but should follow the recruits into the service so as to improve the conditions of employment, both from the standpoint of the efficiency of public work and from that of the welfare of the employees. The older purpose of civil service reform was largely negative—keeping spoilsmen from getting into the service or from controlling it through

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<sup>50</sup> F. Telford, "The One-Man Civil Service Commission in Maryland," *National Municipal Review*, July, 1923, p. 358.

partisan assessments and in other ways. The newer point of view is more positive—to promote efficiency, increase popular control, and bring about a better standardization and classification of the service.

Thus, even in the so-called classified service, there is often considerable variation in the compensation paid state officers and employees who are doing work of substantially the same character. The newer concept of civil service reform involves a more thoroughgoing equalization of salaries, wages, and conditions of employment.<sup>51</sup> Furthermore, the civil service commission should make a biennial examination of the various positions in the different departments, and determine whether the amount of work devolving upon each department is so great as to require the services of additional employees, but more especially to determine whether the amount of work is insufficient to occupy the full time of all the employees attached to the department. If such is the case, the civil service commission should recommend to the head of the department in question an appropriate reduction in the number of employees in the department and should later report to the governor and legislature whether this recommendation had been carried out. A cursory examination of the state departments at the present time shows that a few departments have insufficient help for the amount of work they have to do, but, in the large majority of cases the number of employees now on the payroll is larger than necessary to attend to all the work of the department. Upon investigation and recommendation by the civil service commission, such useless positions should be lopped off. A law should also be passed prohibiting nepotism in the state departments and this should be enforced by the civil service commission.

Some central control should be exercised over office hours, leaves of absence and vacations by such a body as the civil service commission, which should make rules and regulations of a general character regarding them. These rules and regu-

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<sup>51</sup> By the classification act passed by Congress in 1923, a long step has been taken toward applying this principle in the Federal service. See, also, C. L. King, "Pennsylvania Classifies her Employees," *National Municipal Review*, January, 1924, pp. 15-19.



lations need not be uniform for every state department, but some rational ground satisfactory to the commission should exist for every variation from a uniform standard. The eight-hour day is generally recognized as the proper length for the working day and should be adopted as the standard, to be departed from only for good and sufficient reason. If the amount of work in a department is not sufficient to require the head of the department to stay on the job eight hours each day, then the office force should be reduced and extra work placed on the head of the department.<sup>52</sup>

However important the elimination of the spoils system may be, it is obvious that this is not the only benefit which may be expected to be derived from civil service reform. Even though the governor and other appointing officers were sincerely desirous of making appointments on the basis of merit only, they would be practically confined, in the absence of a system of civil service examinations, to choosing from among the mere handful of their personal friends and acquaintances or those of persons in whom they have confidence. This is the atmosphere in which "pull" or "influence" tends to thrive. The system of examinations under the merit plan not only tends to increase the available material for appointment to office, but it also helps to shield the governor and other appointing officers from the importunities of office-seekers, thus enabling them to devote a larger share of their time to more important public business. On the other hand, if the governor is of the spoilsman type or if the administration of the civil service law falls into the hands of those who are out of sympathy with the spirit of the merit system, the mere nominal existence of such a system offers little prospect for real improvement in the condition of the state service.

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## CHAPTER X

### STATE ADMINISTRATIVE REORGANIZATION

THE need for state administrative reorganization is now generally recognized, not only by political scientists and students of administration, but also by public officials and practical administrators. This is indicated by the large number of governors who, in public messages, have urged upon their legislatures the adoption of measures of administrative reform; by the investigations and reports of efficiency and economy commissions or similar bodies created in many states; and by the laws actually passed providing for administrative reorganization in Illinois, Idaho, Nebraska, Ohio, Washington, Massachusetts, Vermont, Pennsylvania, Maryland, Tennessee, and other states. "At the present time few reforms of government in the United States are more urgent than that of the reorganization of the administrative services of our state governments, so as to put them upon the integrated or departmental basis."<sup>1</sup>

A movement of this character naturally follows the line of least resistance, and consequently the changes in administrative organization heretofore made have been through statutory enactment rather than through constitutional revision. Inasmuch as, in most states, a faulty organization of the administration is stereotyped in the constitution, thoroughgoing reorganization by mere statutory enactment is practically impossible. The constitutional difficulties which impede the movement for administrative reorganization should warn us against the insertion in the organic law of detailed administrative provisions. The introduction of the short ballot and the equalization of the terms of office of the governor and other state officers are reforms which are impeded by constitutional restrictions. The changes in the constitution which are desirable in order to provide for needed flexibility are more in the nature of elimination

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<sup>1</sup> W. F. Willoughby, *The Government of Modern States*, p. 393.

of existing provisions than of the addition of others. The Massachusetts constitutional amendment of 1918 providing for the establishment by law of not more than twenty administrative departments represents, in principle, the extent to which it seems desirable to go in adopting positive constitutional provisions regarding the administrative organization.

Minor improvements short of organic revision may produce an increased economy and efficiency in administration, but cannot produce a far-reaching effect so long as the fundamental organization is defective. Radical changes are unwise unless supported by an educated and intelligent public opinion. The development of such an educated public opinion in favor of radical changes in state government is a slow process, because it is necessary for the people to rid themselves of some venerable ideas and traditional notions, such as allegiance to the principles of separation of powers and checks and balances, the undue application of which to the state governments has given us what has been called the "political science of negation."

### Relations of Governor and Legislature

In considering the fundamental improvement in the position of the executive department as a whole, two main questions arise: first, what shall be the relation of the executive to the legislature; and, secondly, what provision shall be made in respect to the internal organization of the executive and administrative authorities? With reference to the first question, two radically different views are held. According to one view, the principle of separation of powers must be altogether abandoned, and it is proposed that this change be brought about by making the legislature the central controlling body in the state government and giving it power to appoint and remove the governor. Those who hold this view favor a close approach to the parliamentary form of government in the states. They also hold that the commission form or, better still, the commission-manager form of city government should serve as models for the reorganization of state government.

With reference to this proposal, it may be noted that in the early governments of the original states, the governor was made

subordinate to the legislature, being appointed by that body in several of them; but the tendency since then has been in the direction of increasing the independence of the governor from legislative control, especially with reference to his political powers. Any plan for the reorganization of the state governments, in order to be successful, should be in harmony with the general trend of their organic development.

Although there was formerly some agitation in favor of the application of the commission form of city government to the states, this proposal is not now seriously made. It is very doubtful whether it would be expedient to apply to the state governments without modification the main feature of commission government—the merging of executive and legislative powers in the hands of the same body. Although the principle of separation of powers has undoubtedly been carried much too far in its application to the state governments, it does not seem wise to go to the other extreme of abandoning it almost altogether by entirely merging the political departments of such governments, or bringing them into such close relation as almost entirely to lose their separate identities. Although the governor is an important political officer, he should also be recognized as holding a distinct and independent position as head of the administration in a much more conspicuous way than is provided for under the commission form of city government.

On the other hand, equal recognition should be given to the position of the governor as a political leader in the matter of legislation and the formulation of public policies. In other words, the governor ought to be in politics, in the best sense of that word. For this reason, it is doubtful whether the commission-manager form of city government is suitable for adoption without modification by the states. The city manager is an administrative expert, subject to the control of the commission, and is not supposed to be in politics. The governor cannot be expected to assume a position of outstanding political leadership and to promote his policies even, if necessary, in opposition to a majority of the legislature, if subject to appointment and removal by that body. The manager plan, if adopted

by the states, would probably tend to reduce the governor to the position of a mere administrative chief.<sup>2</sup>

Although it seems desirable that the principle of separation of powers should not be altogether abandoned in state government, the executive and legislative departments should be brought into closer contact and coöperation than now exists between them. This is necessary in order that the political leadership of the governor may be effective. To this end a constitutional provision should be adopted giving the governor a seat in the legislature, with the privilege of introducing bills and participating in debate, but without that of voting. The heads of executive departments should also be accorded legislative seats with similar privileges, although they would not be responsible to the legislature, but to the governor. This would enable the executive to assume openly a position of leadership in advocating administration measures on the floor, and would also enable the legislature to criticize more intelligently the results of administrative action.

### The Budget System

A rule similar to that adopted by the Illinois house of representatives in 1913 should be established, giving precedence to bills designated by the governor as administration measures. That rule was defective in excepting from such prior consideration appropriation bills. Bills relating to state finance are those which it is especially desirable that the governor should take the initiative in introducing and to which the legislature should be required to give prior consideration. Much the larger share of the expenditures of the state governments is made by the executive and administrative authorities; but, even if this were not true, it seems proper that the governor, in his rôle as political leader, should take the initiative in formulating the budget and in introducing the budget bill. Whoever prepares the budget is likely also to exert an influence upon the plan of state

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<sup>2</sup> It might be desirable, however, in some states to authorize the governor to appoint a state business manager to attend to matters of general administration, such as the purchase of supplies for the operating departments and institutions.

activities or work-program. In planning this work and in drawing up the budget the governor should have the assistance of a staff agency directly under him, which should conduct continuous surveys and investigations of the work of the various agencies engaged in the performance of service functions, in order to collect the information upon which to base a critical examination and revision of the budget estimates.

The legislature should still retain its power of rejecting or modifying the governor's budget. Since the governor retains his item-veto (which should be expanded so as to include the power of reducing items), it seems unnecessary to prohibit the legislature by constitutional provision from increasing the governor's estimates, though its power to do so might be restricted by requiring an extraordinary majority for this purpose. In case of decided and continuous difference of opinion between the legislature and the governor over important parts of his budget bill, provision might be made for settling the question by popular referendum.<sup>3</sup>

The matter of a proper budget system for the state is closely associated with that of the reorganization of the state administration into a more coherent and integrated system. The scattered and decentralized condition of the administrative agencies found in most states renders it difficult, if not impossible, to formulate and carry out a scientific budget plan.<sup>4</sup> If the purpose of the executive budget system is to be accomplished, it is necessary first to effect such a reorganization as will make the governor the real, instead of the mere nominal head of the administration.

### Heads of Executive Departments

This brings us to the consideration of the second main phase of the general subject, namely, internal reorganization, or the

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<sup>3</sup> Cf. Appendix I: The Model State Constitution presented by the Committee on State Government of the National Municipal League, Sect. 27.

<sup>4</sup> J. M. Mathews, *Report of the Consolidation Commission of Oregon* (1918), p. 16. For further consideration of the budget, see below Chap. XI.



readjustment of the relations between the different executive and administrative agencies in the interests of greater unity, responsibility, concentration of authority and efficiency in action. One of the main obstacles to effective administrative organization in most states, which, on account of its constitutional basis, is difficult to change, is the election of the heads of executive departments by popular vote. Considerations of party cohesion may produce some degree of harmony between these officers and the governor, inasmuch as they are all, as a rule, elected on the same party ticket. But it sometimes happens that they belong to a different party from that of the governor, or a different faction of the same party, and frequently the governor is able to exert little or no real control over them. The practice of electing the heads of departments exerts a subtle influence in dividing the administration, developing friction and causing a lack of harmony and coöperation with the governor and between the various departments. It also causes the injection of political considerations and ambitions into the management of elective offices which are not conducive to efficiency and coöperative action.

It is generally agreed that the short ballot should be adopted as one of the main features of a reorganized state administrative system, not primarily for the purpose of lessening the burden upon the voter, but mainly for the purpose of integrating the administration and concentrating responsibility. There is some question, however, as to how short the ballot should be made. Probably the best plan would seem to be to elect only one other officer of the executive department besides the governor, either the lieutenant-governor or the auditor. The office of lieutenant-governor should either be abolished or else reconstructed into a position of greater worth and usefulness. He might be made a sort of deputy governor and relieve the governor of many of the routine duties which now distract his attention from more important matters. In case the office of lieutenant-governor is abolished, then the auditor should be retained on the elective list for two reasons. The first is in order to give him a position somewhat independent of the administration, which might be emphasized by electing him at a

different time from that of the gubernatorial election. The second reason is in order to provide an officer of state-wide, instead of local election, to succeed to the governorship in case of vacancy in that office. In case the office of lieutenant-governor is not abolished, the second of these reasons for electing the auditor no longer operates, and it would be better that the latter be appointed by the legislature as its agent in keeping a check on expenditures.

### Consolidation of Administrative Agencies

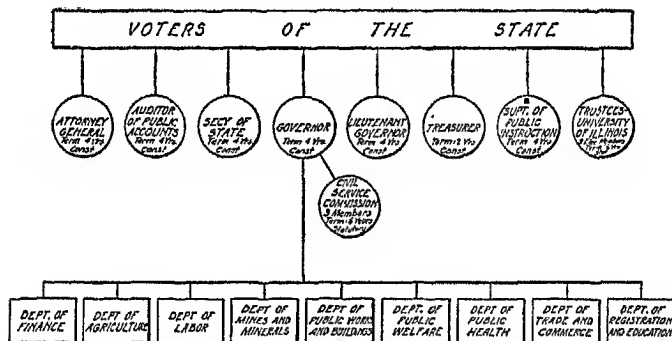
The introduction of the short ballot would, of course, result in increasing the appointive power of the governor. This in itself, however, would not be sufficient to enable him to exercise an effective control over the whole administration in view of the large number and the scattered and disorganized condition of the administrative agencies in many states. It is necessary, in addition, to effect a consolidation and departmentalization of the administrative services. Even though the heads of all the existing departments were placed completely under the control of the governor by granting him the powers of unconditional appointment and summary removal, he would still not be sufficiently argus-eyed to watch over one hundred departments. A reduction in the number of separate agencies is necessary for effective central control over them, as well as for their proper interrelation and coöperation.

As a result of this reduction in number and the increase of central control, the heads of the executive departments could be formed into a body of advisors or governor's cabinet for formulating the policies and planning the general work-program of the administration, upon the analogy of the cabinet officers in the national government. The consolidation of related agencies would tend to simplify the administrative organization and to make it more responsive to the governor and, through him, to the people.

Furthermore, the control of the governor over the state administration should be strengthened either by the transfer from local to state officers of functions connected with the enforcement of state law or by vesting in the governor a larger power

of control over such local officers. No preconceived ideas or outworn formulas of government should be allowed to stand in the way of the main objects of state administrative reorganization, namely, to secure unity, efficiency, and popular control, to give the people the largest possible return for the increasing cost of government which they must undergo, in other words, to afford the largest possible benefits of government to the largest possible number of people.

*ILLINOIS*  
ORGANIZATION OF STATE ADMINISTRATION  
UNDER THE CIVIL ADMINISTRATIVE CODE OF 1917  
AS AMENDED IN 1919



*Departments created under the Civil Administrative Code are indicated by squares. Adjutant General and a few more and temporary agencies have been omitted from this chart.*

*\*Ex officio member of Board of Trustees University of Illinois.*

*See outline of Municipal Research*

The movement toward the consolidation and abolition of boards may be said to have practically begun in New York and Massachusetts in 1901 and 1902 respectively, and has since grown with some degree of steadiness, though it has not generally kept pace with the rapid increase of administrative agencies. The abolition of boards has not had the effect of narrowing the field of state activity, but rather of creating a more centralized control over such activities, for the work of the abolished boards has usually been transferred to existing agencies. The tendency toward the consolidation of

existing boards into a single central body, which takes over the functions previously exercised by the separate boards, has recently been especially marked in connection with educational and with charitable and correctional administration.

There should be probably not more than a dozen main departments into which all the administrative agencies should be grouped. One reason for this limitation is that a larger body of department heads would not be suitable for consultative purposes in cabinet meetings. A more important reason is that a larger number of separate departments tends to complicate and decentralize the work of administration. The number of separate departments should be as small as feasible consistent with the grouping in each department of related functions. The consolidation of administrative agencies thus involves not only the creation of a few major departments in place of a large number of small ones, but also the grouping of related services within each major department. The exact number of departments and the grouping of functions under departments will naturally vary somewhat from state to state, due to differences in local conditions. Some large departments, however, such as those of finance, education, and public health, would probably be suitable under conditions found in all the states.

### Boards v. Single Commissioners

After the regrouping of the scattered administrative agencies into a few major departments has been made, it still remains to be determined what form of internal organization is desirable for these departments. Should we have at the head of the department a board, a commission, or a single commissioner? The prevalence of boards and commissions in the past has been one of the main causes of the disintegration of the administration and the diffusion of responsibility. They have amply demonstrated their incapacity for administrative work. The tendency in reorganization plans, whether proposed or in operation, has been very decidedly away from the board or commission and in the direction of the single commissioner.

This was the plan adopted in Illinois in 1917, and followed



of organization. Thus, in Illinois, all of the nine departments created by the Civil Administrative Code are under single commissioners, called directors; but provision is made for certain commissions, such as the tax commission and the industrial commission, which are nominally placed in the appropriate departments. Provision is also made for certain advisory and nonexecutive boards in some of the departments. The Illinois plan is faulty on account of the loose and ill-defined relation between the commissions and the departments in which they are nominally placed. In departments where there are quasi-legislative or quasi-judicial functions to be performed, associate directors should be provided to act with the head director for the exercise of such functions, but the head director should be solely responsible for the administrative work.

### **Selection of Administrative Officials**

Another question which arises is as to the proper method of selecting the heads of departments and other officers of the administration. The short ballot plan, as already indicated, provides that the governor should appoint the heads of the departments, with the possible exception of the auditor, who, under certain circumstances, may be retained on the elective list. A further question is as to whether the governor's appointments should be subject to confirmation by the senate. Such confirmation is unobjectionable if a tradition exists to the effect that appointments to cabinet positions are to be confirmed as a matter of course. This is the practice in the case of presidential appointments to such position; but there is no assurance that state senates would everywhere take the same attitude toward the governor's appointments, especially when the governor and senate are out of political harmony. Where a power is unobjectionable only when it is not used, there seems to be no good reason for conferring it.

Efficiency and economy commissions, in their proposed plans for state administrative reorganization, usually recommend that the power of the senate to confirm appointments be retained. But this recommendation is probably made for reasons of expediency, since the proposed plan must secure the approval of

the senate in order to be adopted. Looking at the matter from a more detached point of view, it seems better to dispense altogether with the action of the senate in this matter, so as to place the responsibility for appointments squarely on the shoulders of the governor where it belongs, rather than to divide it between him and the senate. The governor may need advice before making appointments, and it may be suggested that it would be sufficient to require the governor to secure the advice of the senate but not to follow it. But no provision of law is needed for this purpose, and it may be presumed that when the governor needs advice in making appointments, he will consult the persons capable of giving it, whether in or out of the senate. The only legal check that seems needful in the matter is to require that the governor issue a public statement indicating his reasons for making the appointment, which should include a description of the appointee's qualifications for the position. This would tend to prevent wholly unsuitable appointments and would at the same time concentrate responsibility for the appointment.

Some plans of administrative reorganization give the governor the power of appointing also the heads of bureaus and divisions within the major departments. But this is a mistake for three reasons. In the first place, it affords a plausible excuse for requiring that these appointments be confirmed by the senate, while no one would contend that this should be required if the appointments are made by the heads of the executive departments. In the second place, it burdens the governor with the importunities of large numbers of office seekers. The time and attention of the governor should not be distracted with matters of petty patronage, but should be free for the consideration of the larger problems of administration. In the third place, it violates the principle of the due subordination of each officer to his superior. The governor ought not to hold the heads of departments responsible for their work unless they are given the power of appointing the heads of the divisions and bureaus within their departments, although they may consult with the governor in making the appointments. The proposal to reduce the number of elective officers does not contemplate that the

total number of officers to be appointed by the governor should be increased, but rather that, instead of appointing many officers and boards of relatively minor importance, he should make only a few, but much more important appointments.<sup>5</sup>

### Conduct of Administrative Business

Although the general scheme of administrative organization should be provided by legislative act, provision should be made for enabling the governor to meet emergencies by conferring on him the power to redistribute functions among administrative agencies in the interest of economy and efficiency, on the analogy of the power conferred on the President by the Overman Act. In the interests of efficiency and flexibility, the duties and functions of the administrative officers and employees should be determined to a large extent by executive orders and regulations rather than by the detailed provisions of legislative acts. The director of each department should be empowered to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its employees, and the distribution and performance of its business. The subordinate officers and employees, under the heads of bureaus and divisions, should not be subject to appointment for political reasons. They should have relatively secure tenure, and a proper separation of politics from administration should be effected by providing for their appointment and removal only in accordance with the principles of the merit system. This system might in time be extended even to the heads of bureaus and divisions immediately under the cabinet officers, since they are not properly policy-determining officers, but it is their duty to carry out the policies of their superiors.

It does not seem necessary that heads of departments should be appointed for definite terms of office. They should serve at the pleasure of the governor, subject to removal by him at any time. This is merely carrying out the plan of the National Government, and has long been the law in Pennsylvania with reference to the attorney-general and the secretary of the com-

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<sup>5</sup> J. M. Mathews, *Report of the Consolidation Commission of Oregon* (1918), p. 10.



monwealth. It seems desirable, however, to provide against any arbitrary exercise of the removal power by requiring that, as in the case of appointments, the governor shall issue a public statement of the reasons for removal. Just as the governor is required to state his objections in vetoing a bill, so he should be required to give similar publicity to his reasons for appointments and removals.

Where terms of office of any members of the administration are specified, they should not be longer than that of the governor. The terms of statutory officers have tended to increase, but this tendency has not been so great in the case of the governor because his term is definitely fixed in the constitution. It should in all states be raised to at least four years, in order that he may have adequate opportunity for carrying out a constructive program. Moreover, his inauguration should take place about two months before the first regular legislative session in his term in order to give him a better chance than he now has of maturing his budget plans and other features of his legislative policy before the session begins.

### **Executive Responsibility**

The plan of reorganization herein proposed makes the office of governor the central pivotal point about which the whole administration revolves. It may be objected to by some on the ground that it makes the governor too powerful. This, however, is merely applying to the states the theory of the national government, in which the President is the real head of the administration. There is no great danger in conferring on the governor increased power if it is accompanied with commensurate responsibility. This responsibility will be enforced in part through the simplified machinery and the greater publicity in which the work of the administration will be conducted under the reorganized system. An adequate civil service system on the merit basis, extending preferably even to the heads of bureaus and divisions, will help to prevent a governor, if perchance so inclined, from using his power to build up a political machine. A permanency of tenure on the part of the heads of bureaus and divisions immediately under the heads of depart-

ments will go far toward maintaining efficiency in administration in spite of the unavoidable frequency of change in the personnel of department heads. A legislative council might be created to sit between regular legislative sessions and to act as a continuous critic of the administration. In order to increase the governor's responsibility directly to the people, provision should be made for his recall by popular vote, subject to reasonable restrictions. This would enable the people to pass upon the governor's general policies prior to the end of his term, as was done in North Dakota in 1921, where the governor was recalled for the first time in any state. If the popular recall is introduced, it would then be feasible to have the governor elected for even longer than a four year term, subject to recall at stated intervals during his term. This would tend to attract abler men to the office and give them larger powers and opportunities of leadership, subject to adequate accountability to the people for the use and abuse of their powers and opportunities.

### Conclusion

The plan of reorganization above outlined departs quite emphatically from the old plan of checks and balances, of diffusion of power and responsibility, of tying the hands of the chief executive for fear he may do some harm. It conceives of the work of the administration as a single task, rather than as a set of disconnected operations. Among its most important features are the impetus which it gives to the idea of unified control through the governor and the promotion of departmental coöperation through cabinet meetings. The plan has been criticized, however, on the ground that it does not provide for a proper separation of politics from administration, and that it fails to make adequate provision for needed continuity in various phases of administrative work.<sup>6</sup> The board system has been preferred by these critics as better accomplishing these purposes, especially in the case of such phases of

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<sup>6</sup> For an able presentation of this view, see F. W. Coker, "Dogmas of Administrative Reform," *American Political Science Review*, August, 1922, pp. 399-411.

administration as that relating to education. Moreover, this plan is followed in some states, notably New Jersey and Wisconsin, which have placed boards and commissions over some important phases of state administrative work and have made them practically independent of the governor.

Boards may be favored in connection with the performance of some functions on account of the very fact that they divide the administration and hinder central control. Thus, it may be argued that the board type of organization is desirable as applied to educational administration, since the determination of educational policies is a matter which should be free from central political control. But if educational administration is placed in an independent position, it would seem logically to follow that other branches of the administration, for example, public health, should receive similar treatment, and the general result would be very badly to divide and decentralize the administration. The argument in favor of placing any particular branch of the administration in a position independent of central political control is probably based at bottom on the fear that if the administration is too centralized it may form an effective instrument for corrupt boss control. Under some circumstances, there may undoubtedly be some ground for this fear, but, in general, the more effective form of organization for the state administration consists in centering both power and responsibility in the hands of the governor.

The unified, integrated plan of state administrative reorganization has not yet been given an adequate trial in actual practice. Where adopted at all, it has been only partially introduced, partly on account of the necessity of bringing within the scheme the older constitutional offices, which of course could not be abolished by statute, and partly on account of political and partisan compromises which had to be made in order to secure even a partial reorganization, and were entered into in the belief that a "half-loaf is better than no loaf." Moreover, this plan of reorganization may not in all cases bring about immediately a very perceptible improvement over the old disintegrated form of administration. For its efficient working, it assumes the existence of conditions which may

sometimes be brought about only as a result of a slow growth. One of these is the existence of an aroused and intelligent public opinion, and this in turn requires the existence of adequate means or sources of information about the conduct of the state's business. Even where such conditions exist, popular control cannot be directly exerted over all branches of the state administration, many of which are technical in character and only experts are fitted to perform the functions involved. Such functions are found in many phases of the administration of public health, public works, education, and other branches. The people as a mass are incapable of judging as to the qualifications of persons appointed to perform these functions, or as to the results of their work in many respects. In these branches of administration, it is eminently desirable that there should be a fair degree of continuity of policy and security of tenure for the personnel. This points to the need indicated above for the further extension of the merit system so as to embrace the entire personnel of the several departments below the head of the department immediately under the governor. The clean sweep of the technical staff every two or four years with a change of administration is intolerable. Either by written law or by unwritten custom, the merit system of appointment and security of tenure for those who are efficient must be applied to the administrative personnel.

A proper separation of politics from administration is not to be secured by diffusion of responsibility and disjointed organization, but by the more adequate development of the merit system and by the growth of a well-established tradition against undue interference by political officers in the technical matters of administration. A distinction must be drawn between partisan control and political control, in the better sense of the word political. The former kind of control over the administration should be reduced, but the latter should be retained and exerted through the governor in his official capacity not only as an administrative chief but as the political head of the state government.

No state can expect to work out its political and governmental salvation through mere administrative machinery. The char-

acter of the men who work the machinery is equally, if not more, important. In the last analysis, therefore, although scientifically constructed machinery is a help to the most capable of officers, the successful working of the plan of reorganized administration is dependent upon the competence and integrity of the governor and his appointees as heads of departments. The election of a governor of the spoilsman type, who attempts to build up an unscrupulous machine by shady methods will throw a monkey wrench into the best constructed machinery; yet under the reorganized system outlined above, he probably will be able to do less harm than under the old disintegrated form of administration. This may sound paradoxical, but the reason is that the invisible government or corrupt political control thrives under the old plan of disintegration and diffused responsibility because it can best operate in the dark. The reorganized plan, by concentrating responsibility for the work of each department in its head and for the work of the whole administration in the governor, promotes publicity and acts as a deterring influence against the commission of the more heinous forms of betrayal of the public trust.

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## CHAPTER XI

### TAXATION AND FINANCE

GENERALLY speaking, everything that the state government does costs money and, consequently, the activities of the government in connection with the raising and expenditure of money are necessary prerequisites to the performance of all other functions. The importance of the financial operations of the state corresponds roughly to the aggregate scope and extent of its functions and activities. The increasing paternalism of the state, the ever-widening scope of state interference, the need for better highways, better educational facilities and other modern improvements require an ever-increasing outlay on the part of the state, which must, sooner or later, be met out of the proceeds of taxes. Ever more acute and pressing, therefore, becomes the problem of securing a productive and equitable system of taxation and of adopting economical and efficient methods in the collection and disbursement of public funds.

The financial operations of the state government may, for purposes of convenience, be considered under three main heads: first, income; secondly, expenditure; and, thirdly, the correlation of income and expenditure. The income of the state is derived not only from taxes, but also from fines and from fees and charges imposed upon particular individuals for special services or reasons. Minor sources of state revenue include interest, rent, grants, gifts, forfeitures and escheats, and earnings of business enterprises.<sup>1</sup>

#### State Debts

From the standpoint of bookkeeping, states also derive an income from floating loans and selling bonds. The issuance

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<sup>1</sup> The revenue receipts of all the states for 1922 are classified by the Bureau of the Census as follows:



of bonds is a device whereby a state is enabled to spread over a series of years payments, the total amount of which would otherwise have to be met out of current taxes. From the standpoint of financial policy, resort to this device is justifiable in the case of large expenditures for permanent improvements and extraordinary or unusual objects, but the date of the maturity of the bonds should, of course, not be placed beyond the life of the benefit to be secured from the contemplated expenditure. The exercise of the borrowing power by the state governments may be essential to the carrying out of an important public work, such as the opening up of waterways for navigation and the adoption of a far-sighted policy of conservation of natural resources. In the hands of the state governments, however, the lack of adequate safeguards against the unrestricted exercise of this power may lead to the piling up of huge and largely unnecessary debts for posterity to pay. The experience of the states during the internal improvement period before the Civil War led to the adoption of various constitutional restrictions designed to discourage excessive exercise of the debt-incurring power of the legislature, such as the requirement of an annual tax sufficient to pay the interest and discharge the principal of

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(In thousands of dollars)

From taxes:

General property .....	\$348,291
Special property .....	81,003
Other special taxes .....	115,160
Poll .....	8,322
Business .....	174,340
Nonbusiness license .....	131,025
From special assessments and from special charges for outlays	9,409
From fines, forfeits and escheats .....	6,002
From subventions and grants .....	94,322
From donations and pension assessments .....	16,393
From earnings of general departments .....	116,549
From highway privileges .....	13
From rents and interest .....	54,992
From earnings of public service enterprises .....	3,698

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Total ..... \$1,159,527  
 Bureau of the Census: Financial Statistics of States, 1922, pp. 52, 53.

the debt upon its maturity,<sup>2</sup> or that no debt in excess of a certain minimum shall be incurred, unless for specified purposes or unless authorized by popular vote.<sup>3</sup> In practice, however, the legal limitation of a popular referendum has not operated as a very decided check upon unwise and unnecessary borrowing. Nevertheless, some states now have scarcely any indebtedness, either bonded or floating; while, in all the states, the total outstanding indebtedness, as compared with the total assessed valuation of property within the state, is small.<sup>4</sup>

### The General Property Tax

About half of the states of the Union have constitutional restrictions requiring the continuance of the general property tax. Furthermore, more than one-third of all state revenues are derived from this tax, so that it may be justly described as the distinctive and characteristic American form of taxation. The general property tax was in origin primarily a local tax and was locally administered. The actual administration still continues to remain in large measure in the hands of local authorities. The process of administering the general property tax consists in the assessment or valuation of property which is taxable within the given jurisdiction, the calculation of the tax rate upon the basis of the total valuation as compared with the amount of proceeds desired from this source, the computation of the proportionate share of the total taxes to be paid by each taxpayer, the levying of this amount against him, and the collection of the tax. The determination of the state tax

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<sup>2</sup> The proposed New York Constitution of 1915 provided that this sinking fund plan should be displaced by the simpler and more business-like serial bond plan, under which the bonds would be paid in equal annual installments.

<sup>3</sup> Cf. H. Secrist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Bulletin of the University of Wisconsin, Economics and Political Science Series*, VIII, No. 1, Part 1; H. C. Adams, *Public Debts*, Part III, Chap. IV.

<sup>4</sup> In 1913 the total outstanding debt of all the states was \$423,000,000, more than half of which was owed by Massachusetts and New York. By 1922 the total net indebtedness had increased to about \$879,000,000. Since that date the rate of increase has been more rapid on account of the movements for good roads and soldiers' bonuses.

rate is made either by legislative enactment or by a state board or official. The assessment of the property and the collection of the tax are in the hands of local officials. When collected, the respective shares of the proceeds due the county and state are transmitted to the county and state treasurers by such local officials.

The initial step, as well as the most important and fundamental in the administration of the general *ad valorem* system, is the assessment or valuation of the various articles or pieces of property. For the purpose of making this assessment, the local subdivisions of the state, such as counties, cities and towns, are adopted as taxing districts. In so far as the state depends on the property tax for its revenue, it is directly concerned in the accuracy and efficiency with which the original assessment is made. Nevertheless, in accordance with ideas of local home rule, which have their roots far in the past, the assessment is generally made by appointed, or, more usually, elected officers of the local unit of government. The method of local election by the voters whose property it is his business to assess, tends to secure incompetent assessors, and if, by chance, an efficient man should be elected, his very efficiency is apt to cause his involuntary retirement from the office at the earliest opportunity. The actual valuation of different kinds of property is a function requiring, for its proper performance, a considerable degree of technical knowledge. Yet the local assessor is called upon to perform it without adequate means at his disposal, other than his own judgment and the assessment roll of his predecessor. Frequently, the previous valuations are followed with little change, and thus inequalities are perpetuated.

Most of the states having the general property tax require by law that all property, both real and personal, shall be assessed at its full and true value in money, which is usually construed to mean the price which it would bring at a voluntary sale in open market. But the hiatus between the law and its administration is great. In actual practice, the ideal of full valuation is seldom realized. Realty approaches it more nearly than other forms of property, but personal property is notoriously undervalued, or escapes entirely. Frequently, personal prop-

## STATE TAXATION, INDEBTEDNESS, REVENUES, AND EXPENDITURES

(In Thousands of Dollars)

The figures in this table are supplied by the Bureau of the Census from its report, "Financial Statistics of States, 1918." They relate to the fiscal year ended June 30, 1918, or the first fiscal period prior thereto.

State	Assessed Valuation of Property Subject to the General Property Tax	Total Levy of the General Property Tax	Bonded Debt	Net Debt <sup>1</sup>	Receipts		Expenditures	
					Revenue	Non- Revenue	Gov- ern- mental Cost	Non- Gov- ern- mental Cost
Alabama .....	673,226	4,376	9,057	13,277	8,013	4,413	7,933	4,493
Arizona .....	697,527	3,746	3,009	774	4,644	1,832	4,003	1,712
Arkansas .....	524,379	3,933	1,468	1,466	4,840	3,659	4,545	3,158
California .....	.....	.....	39,402	39,127	29,780	20,654	33,521	23,066
Colorado .....	1,305,286	4,072	4,548	4,533	5,120	8,193	5,735	7,448
Connecticut .....	1,280,077	1,998	12,535	8,509	16,358	8,168	10,712	11,689
Delaware .....	.....	.....	912	874	1,635	714	1,386	774
Florida .....	322,216	2,900	602	602	3,509	3,506	3,648	2,493
Georgia .....	991,662	4,958	5,945	6,028	7,927	3,895	7,579	4,081
Idaho .....	437,593	915	2,712	2,165	2,268	3,324	2,823	2,603
Illinois .....	2,587,583	23,288	243	2,057	29,072	6,411	25,453	5,985
Indiana .....	2,123,709	7,454	668	181	14,533	2,780	12,704	3,218
Iowa .....	1,305,694	7,425	130	130	13,049	3,668	11,502	3,720
Kansas .....	3,075,274	4,459	.....	.....	7,992	6,546	7,762	5,689
Kentucky .....	1,859,716	6,751	76	2,587	10,861	7,920	10,880	7,178
Louisiana .....	706,276	4,414	11,694	13,723	7,580	9,932	7,273	9,674
Maine .....	521,043	3,211	2,511	3,799	7,369	1,455	7,673	898
Maryland .....	1,168,686	3,724	27,449	20,156	10,091	9,893	11,143	8,812
Massachusetts .....	4,501,564	10,921	130,618	87,984	30,824	41,070	32,029	38,812
Michigan .....	3,087,453	14,858	2,500	9,225	24,264	10,772	24,749	8,623
Minnesota .....	1,804,959	5,939	1,391	1,391	23,735	4,852	19,802	6,607
Mississippi .....	637,520	2,550	3,053	5,431	5,254	2,936	5,481	2,905
Missouri .....	1,951,669	3,513	3,384	6,783	13,022	2,112	13,012	2,757
Montana .....	536,767	1,700	1,163	959	6,374	10,985	4,220	12,095
Nebraska .....	529,322	4,504	.....	.....	5,390	1,877	6,057	2,935
Nevada .....	167,424	1,100	356	736	1,305	1,457	1,403	1,693
New Hampshire .....	478,621	1,346	818	1,798	2,456	1,520	2,792	1,683
New Jersey .....	2,937,052	12,694	.....	116	23,181	4,368	21,131	4,491
New Mexico .....	357,063	1,933	3,497	2,799	2,292	4,278	2,873	3,912
New York .....	12,091,438	14,120	236,215	181,289	81,786	37,729	84,951	46,051
North Carolina .....	2,427,766	2,608	9,363	9,488	5,907	4,152	5,407	3,756
North Dakota .....	394,723	1,697	447	436	5,061	6,098	4,828	7,431
Ohio .....	8,542,734	3,844	2	5,347	23,185	11,749	22,146	8,703
Oklahoma .....	1,335,221	3,338	6,329	5,990	11,174	9,334	9,066	8,867
Oregon .....	878,764	2,699	950	499	4,411	4,470	4,380	3,858
Pennsylvania .....	.....	.....	1,072	473	34,058	5,922	30,902	6,729
Rhode Island .....	769,348	923	7,624	6,437	4,464	615	4,278	553
South Carolina .....	349,654	2,732	5,338	5,438	3,158	3,899	3,540	3,199
South Dakota .....	1,441,475	2,165	6,425	.....	5,207	12,513	5,036	7,844
Tennessee .....	700,466	3,502	13,077	16,005	6,450	4,090	7,179	3,979
Texas .....	2,888,365	17,330	4,737	4,737	24,314	4,995	22,205	4,700
Utah .....	595,211	3,091	3,060	2,712	4,153	3,820	4,586	3,480
Vermont .....	281,071	1,491	752	785	3,784	982	3,591	937
Virginia .....	1,270,750	3,310	23,112	22,862	10,654	5,523	9,992	6,224
Washington .....	1,000,083	8,331	344	672	11,835	6,955	11,095	8,045
West Virginia .....	1,374,507	1,576	.....	.....	5,721	7,690	4,023	7,605
Wisconsin .....	4,244,391	10,855	.....	1,051	18,095	3,618	16,648	3,596
Wyoming .....	247,517	953	102	102	2,055	2,858	1,868	2,622

<sup>1</sup> Net debt is funded and floating debt less sinking fund assets.

<sup>2</sup> General property not assessed for state purposes.

erty taxes are assessed upon hardly any one in the community except those whose names are already on the assessment rolls as liable to taxes on real estate. It is physically impossible for the assessor to assess all personal property from actual view, and it is customary in many places to require the taxpayer himself to make a sworn statement of his taxable property, the different items being listed under various subheads. In some states he may be required not only to list all his property under oath, but also to swear to the value of each item. This method practically amounts to self-assessment, for, though the assessor may revise the statement, he usually makes little effort to verify its sufficiency. It is obvious that such a plan is doomed to failure. "If Jove laughs at lovers' vows, he probably guffaws at taxpayers' oaths. Even the Psalmist's hasty allegation of universal mendacity needs little qualification in this province of finance. Where the taxpayer's conscience is tender, he finds that virtue is perforce its own reward."<sup>5</sup> Instead of being equal in proportion to ability, the tax becomes progressive in proportion to honesty. It thus places a premium on dishonesty, and has been justly described as a "school of perjury."

The general property tax is thus seen to be, in actual operation, unequal not only as between different individuals, but also as between different classes of property. Under this tax personal property everywhere fails to bear its proportionate share of the burden. This is true even with respect to tangible personalty. Some states have adopted what has been called the "ostrichlike policy" of legalizing fractional assessment. It might be supposed that little importance is to be attached to undervaluation in itself, since its effects may be counteracted by the simple device of shifting the tax rate. But the evil of undervaluation is that it tends to intensify, at the same time that it disguises, the extent of the inequalities between individuals within the same taxing district.

The administration of the general property tax by local assessors produces inequalities not only between individuals within the same taxing district, but also between different taxing

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<sup>5</sup> W. M. Daniels, *Elements of Public Finance*, p. 123.

districts. Inasmuch as the state tax is laid upon each county and the county tax upon each minor taxing district in proportion to the total assessed valuation of property within such county or district, a positive incentive is held out to the local assessor to keep the valuation as low as possible, in order that his district may bear as small a share as possible of the state and county taxes. Each local assessor vies with the others in the race towards undervaluation. The result is that in all of the taxing districts, property is undervalued, but the extent of the undervaluation is not likely to be exactly the same in any two districts. It must not be supposed, however, that the incentive to undervaluation which results from taking the local assessments as the basis of state and county taxes is the sole cause of inequalities between different taxing districts. Quite aside from this consideration, inequalities of this kind would almost inevitably arise where each local assessor proceeds entirely on his own responsibility, without effective coöperation with other assessors and without adequate central guidance or control.

The operation of the general property tax, therefore, results in inequalities between the owners of the same kind of property, between the owners of real and personal property, and between different taxing districts.<sup>6</sup> It was originally adopted as a state tax as a matter of convenience because it already existed as a local tax, and, in an age when property was tangible and localized, it was deemed to be, at least theoretically, proportionate to taxpaying ability and in accordance with the democratic principle of equality of sacrifice. When attention is directed, however, to its actual administration under present-day conditions, it is found to be inequitable because it does not rest on individuals or corporations in proportion to taxpaying ability, but rather in inverse proportion to such ability. If, as its name implies, it were in reality a general property tax, it would still not be an ideal tax, but many of the objections now made to it would be invalidated. Inasmuch, however, as certain kinds of property, such as intangible personalty, very largely escape, it fails to be in reality a general property tax. It may be questioned

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<sup>6</sup> Cf. H. C. Adams, *Science of Finance*, pp. 434-449.

whether the general property tax is the best available tax for state purposes, both from the standpoint of a just distribution of tax burdens and from that of yield or revenue to the state.

The fact that the states still rely so largely upon the general property tax or, at least, retain it upon their statute-books, is due in part to a tendency on the part of many people to regard the theory of the law rather than its actual administration, in part to constitutional restrictions which prevent a modification of the law, and in part to the feeling of certain persons or classes of persons in the community that any change would be likely to work adversely to their interests. In spite, however, of popular and legislative inertia, of constitutional restrictions, and of the opposition of interested persons, many inroads have been made in various states upon the general *ad valorem* system based on local assessments. The history of state tax administration during the last few decades may be said to consist in large measure of the efforts of various states to strengthen, to modify, or to provide substitutes for the general property tax. Among the principal methods or devices which have been adopted or considered in order to effect these objects may be mentioned equalization and review, strengthening of local administration, direct state assessment or apportionment on a basis other than local assessment, separation, classification, exemption, the adoption of special state taxes, and the centralization of administration through the creation of permanent state tax commissions.

### Equalization of Taxes

The oldest and most widespread method adopted for the purpose of remedying the inequalities of the general property tax is through what is known as equalization or review after the original assessment has been made. For this purpose, state and local boards of review or equalization have now been provided in most of the states. There is usually a county board of review, whose function it is to equalize the aggregate assessments of the taxing districts in the county, and it may also, as a rule, change individual assessments. The correction of errors, however, in the assessments of the comparatively few indi-

viduals who go to the trouble and expense of appealing to the county board barely touches the surface of the inequalities in the assessments as a whole. The local boards of review are usually *ex officio* bodies, who are either constituted judges of their own work of assessment or else are too unfamiliar with the conditions with which they are called upon to deal. Hence, the work of such boards is largely ineffective; political influences not infrequently enter into their determinations, and sometimes their conduct of official business degenerates into a contest between groups of members representing urban and rural taxing districts, respectively, in which entire valuations of districts are arbitrarily increased or diminished.<sup>7</sup>

Finally, in all except a few Southern states, provision is made for some plan or method of state equalization. In a number of states, the function of state equalization has now been conferred upon permanent state tax commissions. Under conditions of widespread inequality in local assessments, equalization by the state board cannot effect a general improvement without amounting practically to a general reassessment. Inasmuch, however, as a general reassessment would be beyond the scope of action of the old-fashioned state board of equalization, the original assessments, if unequal at first, are very likely to remain so, as far as any corrective influence on the part of the state board is concerned. The attempt of the board to equalize after the assessment has been not inaptly described as shutting the barn door after the horse has escaped. These boards represent ineffective attempts to cure inequalities, whereas the need is for some means of preventing such inequalities from arising in the first place. If the original assessments are reasonably fair and accurate, there will then be little need for any subsequent equalization.

Some degree of expertness in the making of the original assessments is almost the *sine qua non* of an efficient *ad valorem* system, yet this can scarcely be attained under prevalent methods of local assessment work and the system of local control of the assessment officers. Assessors should be given longer

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<sup>7</sup> Cf. Report of New Jersey Special Tax Commission of 1890, *New Jersey Legislative Documents*, 1891, I, pp. 12ff.



terms or even indefinite tenure, more continuous employment, more adequate compensation, and should be supplied with tax maps and other necessary tools. In order to effect some of these improvements, a change in the size of the local taxing district would be necessary in many states. In rural districts, the taxing unit should be not less than the county, as it is already in a number of states. The establishment of the county-assessor system and the abolition of the numerous local assessors has been strongly recommended by a number of state tax commissions.<sup>8</sup> Assessors should be appointive rather than elective, and the appointments should be made by the county board subject to state central supervision, or by the state tax board in accordance with civil service regulations.

### State Supervision of Local Assessments

The proposed reforms in local tax administration outlined above are of importance not only to the locality but also to the state, both from the standpoint of safeguarding its sources of revenue and also from that of the efficiency of its administrative machinery. Most of the reforms mentioned do not involve central administrative supervision, but, if introduced, they would create conditions upon which such supervision could work with much greater effectiveness than upon those now generally prevalent. To the reforms mentioned, therefore, central administrative supervision should be added in order to create a well-rounded and efficient system, for, as has been said, "the experience of the American states demonstrates beyond all doubt, cavil, or contradiction, that there never was and never can be a generally satisfactory assessment by purely local authorities."<sup>9</sup> Inasmuch, however, as the assessments made by local officers constitute the basis of the local tax as well as of the state general property tax, the localities are directly con-

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<sup>8</sup> *Report of Minnesota Tax Commission, 1912, p. 123; Report of North Dakota Tax Commission, 1912, p. 158; Report of Kansas Tax Commission, 1913, pp. 35-37, 85.* The North Dakota Commission calls attention to the fact that uniformity is impossible in that state, where there are over 1,400 local assessors with no adequate central control.

<sup>9</sup> C. J. Bullock, in *Proceedings of the Washington State Tax Conference, 1914, p. 230.*

cerned in the fairness and accuracy of such assessments, and it would therefore be scarcely feasible in most states to place the selection of the local assessors directly in the hands of the central state authorities, for this would be considered by many as too great a departure from the principle of home rule. In order, however, to safeguard the interests of the state and to prevent the virtual nullification of its laws, some degree of central administrative supervision, either direct or indirect, should be established over the local assessor and over the methods of local assessment work.

Central supervision of local assessments has advanced further and more rapidly in those states having permanent state tax commissions. State central tax agencies may be classified into those having (a) power to assess directly certain forms of property not suitable for local assessment, such as corporate property, (b) power of direct assessment and also power to equalize tax assessments generally, and (c) in addition to the above powers, that of exercising supervision over local assessors and assessment work. Permanent state tax commissions, strictly speaking, fall only into the last of these three classes. The more important specific powers which have been conferred upon tax commissions by law in various states may be summarized as follows:

1. Power to prescribe uniform records, blanks, assessment rolls and all other necessary forms for use by local assessors, and to suggest uniform systems of public accounting for local units of government.
2. Power to exercise a general supervision over the entire administration of the tax laws, to confer with and advise assessors and other local tax officials, and to furnish them with information and instructions relating to the discharge of their duties.
3. Power to require reports from the local assessors and to inspect and criticize their work, and to require their attendance at state-wide tax conferences.
4. Authority to investigate assessments and tax conditions generally for the purpose of securing information upon which to base the action of the commission, or to make recommenda-

tions to the legislature, and, for this purpose, to subpoena witnesses, take testimony under oath, and require the production of books and papers.

5. To remove local assessors for inefficiency or dereliction of duty, or to cause proceedings to be instituted for this purpose and for the purpose of enforcing the tax laws generally.

6. To appoint county officials or boards having power to assess or to supervise assessments.

7. To order the reassessment of particular pieces of property or of entire taxing districts.

8. To equalize the assessment of property throughout the state, or to order a reëqualization of assessments by the county boards.

9. To assess directly certain special classes of property.

Some of the above powers are found quite generally; others in comparatively few states. Inasmuch as it is scarcely practicable in states of average size for the state tax commission to watch closely the work of all of the hundreds of local assessors, the efficiency of central supervision over such local assessors is increased by the existence of county supervisors of assessors, particularly if the latter are subject, to some extent at least, to direct central control. The direct appointment by the state commission of the hundreds of local assessors is hardly feasible, not only because such a move would have to overcome the weight of popular prejudice in favor of so-called home rule (or home mis-rule) as well as constitutional difficulties in some states; but also because, under present conditions, it is doubtful whether the commission should be burdened with the task of selecting so many local assessors. There would, however, be less objection to, and many positive reasons in favor of, giving the commission the power of removing local assessors in particular cases of flagrant incompetence and the further power of filling the vacancies thus created. If, however, township assessors are abolished and county assessors are given original assessing powers, the problem of state control is simplified. Matters of local detail and the close supervision over the hundreds of local assessors can be better attended to by the county tax officials, thus allowing the state commission to devote its

attention more fully to general supervision and to the shaping of a broad state-wide policy within the limits of the law. Such specialization of function does not necessarily produce looseness of control over the local assessors if the county official is under the effective supervision of the state body.

The exercise by state tax commissions of the power to investigate tax conditions generally and to make intensive studies of the assessment work in particular localities is important as affording a basis upon which to build up an improved administration of the state tax laws. A central agency for the collection of such information is indispensable, for the localities do not usually have the means of employing the necessary experts, even had they the inclination or power to make extensive investigations. The state commission "represents a joint or co-operative method of doing for the local governments what they cannot afford to do severally and individually. It is the economical way of securing efficient administration. When properly equipped, it acts as a great central reserve of expert aid."<sup>10</sup>

The advice and help which the commission is able, through its broader outlook and wider information, to give to local assessors may be of considerable benefit in improving the character of local assessments, even if the powers of the commission are merely advisory. But the best results cannot usually be obtained unless the commission has power to insure compliance with its advice and instructions. The most powerful instrument yet placed in the hands of the state tax commissions, designed to give them control over the work of local assessors, is the power given in some states to order a reassessment of particular pieces of property or of entire taxing districts. In these states the commission may, either upon informal complaint of aggrieved taxpayers, or groups of taxpayers, or upon its own initiative, order a reassessment to be made directly by its own agents and in accordance with its own rules. The expense of making the reassessment, moreover, is to be borne by the district concerned. A powerful incentive

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<sup>10</sup> T. S. Adams, in *Proceedings of the Fifth New York State Conference on Taxation, 1915*, p. 20.

is thus set at work which tends towards securing equitable and efficient assessments in the first instance. The very existence of the untrammelled power of ordering a reassessment renders its frequent use unnecessary.<sup>11</sup>

The work of state tax commissions has undoubtedly brought about in most states a very decided increase in the percentage of actual assessments to full value. The good effects of the establishment of state tax commissions, however, are not confined merely to increasing the aggregate valuations, but are evidenced also in a diminution of the inequalities between taxpayers and tax districts, and a general invigoration of the entire system of tax administration.

### The Taxation of Corporations

While the general property tax is essentially a locally administered tax, the adoption of special taxes is usually accompanied by an offshoot or by-product in the form of centralized administration. This is especially apt to be true if the property upon which the new special taxes are levied has an extra-local situs, as in the case of most railroads. In order to make corporate property bear its just share of the general tax burden, a greater degree of central control over the administration of the taxes upon such property is necessary.

The method formerly prevalent of intrusting the assessment of corporations for taxes to the older state fiscal officers or to *ex officio* boards is still found in a few states. Many states, however, have from time to time established special state central agencies for the assessment of different kinds of corporations. The movement towards the creation of permanent state tax commissions has been due in large measure to the need for special state authorities to assess the property of railroad and other corporations. Supervision over local assessments has from time to time, as we have seen, been vested in

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<sup>11</sup> The constitutionality of reassessment statutes has been upheld by the courts in Wisconsin, Michigan and Minnesota. *State ex rel. Hussey v. Daniels*, 143 Wis. 649; *State Tax Commissioner v. Board of Assessors*, 124 Mich. 491; *State v. Minnesota & Ontario Power Co.*, 141 N. W. 839. *Cf. Proceedings of National Tax Association*, 1913, pp. 174ff.

state central agencies. Such agencies, however, have usually been created primarily for the purpose of making original assessments and administering special taxes upon particular classes of property not suitable for local assessment. The direct or original assessment by state authorities of such special forms of property and the levying of special state taxes upon them generally developed at an earlier date than the supervision of local assessments by permanent state tax commissions. In the large majority of states, such commissions or other state agencies now assess for taxes the property of transportation companies, especially railroads.

Unfortunately, the assessment of corporate property is not always concentrated in the hands of a single state board or official. The tendency, however, is to consolidate related functions in the hands of a single state board.

Not only do we sometimes find a division of responsibility between different state authorities in the assessment of corporate property, but also a similar division between state and local authorities. General industrial or business corporations are sometimes assessed entirely by local officers. Whatever the character of the corporation, it should be assessed as a unit, in order to take into consideration those intangible elements of value, known as franchise or corporate excess, which exist in addition to the value of the physical property. In the case of corporations whose property is of state-wide extent, local assessors are manifestly not in a position to assess such physical property together with intangible elements of value as a unit.

In many states the general property tax at a uniform rate is still the method used for taxing some kinds of corporations. Indeed, the constitutions of many states still require the taxation by a uniform rule of all property, both of individuals and of corporations. In many states, however, the general property tax has been modified or supplemented by the imposition of special state taxes on corporations, differing in form from the taxes laid on individuals. Such special corporation taxes are in some states laid on all corporations in general, while in others special taxes are levied upon particular classes of corporations, such as banks, insurance com-

panies and various kinds of transportation and transmission companies. Sometimes the special taxes thus levied are superadded to the general property tax; sometimes they are in lieu of all other taxes.

The principal kinds of special taxes upon corporations are taxes upon incorporation, upon property, upon capitalization, franchises, or corporate excess, and upon earnings or business receipts. Taxes or fees upon incorporation of domestic corporations are found in all the states, and license taxes are usually levied on foreign corporations. The method of taxing corporations now generally favored in states east of the Mississippi River and north of the Ohio is that upon the basis of earnings or business receipts. Such earnings may be considered theoretically as the measure of the value of the property and the earnings tax, from this point of view, would be merely a roundabout method of assessing a property tax, while avoiding the difficulties of making a physical valuation of the property. In reality, however, the earnings tax departs radically from the *ad valorem* basis and uses income as the test of taxpaying ability.

### Separation of State and Local Revenues

The direct or original assessment of corporations by state authorities has tended to set them off as special sources of state revenue. In some states the amount of revenue derived from corporation taxes has increased to such an extent as to constitute a very considerable proportion of the entire revenue of the state. Other sources of revenue, such as inheritances, where a broad base is desirable in order to prevent great fluctuations of yield, are also better adapted to form state, rather than local, objects of assessment and taxation. Furthermore, corporation charters and the rights of inheritance are derived from the state and, consequently, special duties are owed to the state in return for the enjoyment of these rights. On the other hand, certain forms of property, such as real estate, are more suitable for local assessment and taxation, subject to a reasonable degree of central supervision. These circumstances point to the existence of a natural distinction between the proper

sources of state and local revenue, and explain a tendency discernible in many states towards an actual separation of such sources. In some states the amount of revenue derived from sources set aside as special objects of state taxation has been so large as to enable those states to dispense almost entirely or altogether with any direct property tax for general state purposes. In some states, therefore, segregation of sources of revenue has actually been achieved. The principal sources reserved for state taxation are banks, insurance companies, public service corporations, inheritances and income. A proper separation should be based upon an allocation to the state of those objects of taxation which can be more efficiently assessed by state than by local authority and to which may be applied the method of taxation on income or earning capacity, while property taxes which cannot easily be administered uniformly over a large area should be reserved to the localities.

Separation was formerly regarded by some as almost a panacea for all the ills of state and local taxation, but relatively less importance is now attached to it. Whether it should be introduced in any particular state depends to a considerable extent on the conditions in that state. In some states it is doubtful whether there are a sufficient number of segregateable sources to make its introduction feasible.

Among the advantages which have been urged in favor of separation are that it will reduce the burden of local taxation by abolishing the state surtax upon local property, and that it will secure greater equality of assessments as between different taxing districts because the incentive to undervalue property in order to bear as small a proportion of the state tax as possible will be removed. In practice, however, neither of these expectations appears to have been realized. The state surtax is a relatively small part of the total tax on local property, and its abolition appears to have little effect on the tendency to undervaluation, which may be largely due to other influences. Under the system of separation, however, undervaluation by local assessors is no longer of importance from the standpoint of state finance. Separation renders equalization between counties unnecessary, though



it may still be required as between individuals and between taxing districts within the county.

An objection to separation upon which considerable stress is laid is that it leads to extravagance in legislative appropriations.<sup>12</sup> It is argued that since, as a result of separation, the state derives the bulk of its income from corporations, the direct concern of the individual taxpayer in keeping down appropriations and in the efficient administration of the state's finances is lessened. In the virtual absence of a direct property tax levied by the state, extravagance in the administration of the finances of the state will not directly affect the pocketbook of the individual property owner, and he will therefore look with comparative equanimity upon such extravagance, and will not attempt to exercise any control over the state's finances in order to check it. The individual property owner, however, would not in any event be able to exercise, with continuous effectiveness, a control over the financial officers of the state, so as to prevent wastefulness and inefficiency in the collection of state taxes and extravagance in the spending of the public funds. Such control, in order to be continuously effective, ought to be exercised by executive officers who are themselves responsible, either mediately or immediately, to the individual taxpayers. It may be shown that the largest expenditures are found in those states in which separation is farthest advanced, but this does not necessarily prove a causal connection between separation and increased expenditures, for the latter may be due to other causes.<sup>13</sup>

Two further objections to separation are that it produces inelasticity in state revenues, and that it leads to decentralization in tax administration. Under the general property tax for state purposes, the varying revenue needs of the state could be met by raising or lowering the tax rate. Where separation has been introduced, however, the revenues of the state will

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<sup>12</sup> Cf. *Third Report of Kansas Tax Commission*, 1913, p. 13.

<sup>13</sup> This fallacy is apparently committed by Prof. T. S. Adams in his article on "Separation of State and Local Revenues," *Annals of the American Academy of Political and Social Science*, March, 1915, pp. 135, 136. It should also be noted that large expenditures are not necessarily evidence of extravagance.

not necessarily coincide with its legitimate needs, but the tax rate upon most of the sources reserved for state use cannot usually be raised or lowered frequently without tending to unsettle business. This objection may be met by finding additional sources of state revenue, by varying the rate on some of the existing sources, by making the state tax rate high enough to provide a surplus for unforeseen revenue needs, or by apportioning an additional tax upon the localities in proportion to their revenues or expenditures.<sup>14</sup> If these measures are not sufficient to produce an elastic state revenue, then separation should be at least partially abandoned, for the activities of the state should not be subject to arbitrary enlargement or restriction in accordance with the proceeds of an inelastic revenue base.

The objection to separation most frequently urged, however, is that it tends towards financial decentralization and disintegration. This objection does not, of course, apply to taxation upon those objects reserved for state use, for here centralization and separation have proceeded *pari passu*.<sup>15</sup> But with respect to the administration of local taxation, it is feared by many that separation will lead to laxness of central control. Local taxing districts will largely manage their own affairs, local assessors will act independently of outside control and the result will be chaos in local tax administration. Theoretically, there would seem to be no necessary incompatibility between separation and centralization in tax administration. "The relegation of the general property tax," says Professor Seligman, "to the local divisions would not in any way conflict with the principle of effective central control over local assessments."<sup>16</sup> Moreover, in practice, some degree of centralization is usually found combined with separation in the same tax system. It must be admitted, however, that separation does not operate directly to strengthen central control over local assessments and it may

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<sup>14</sup> E. R. A. Seligman, "Separation of State and Local Revenues," First National Conference on State and Local Taxation (1907), p. 502.

<sup>15</sup> Cf. S. P. Orth, "The Centralization of Administration in Ohio," *Columbia University Studies*, XVI, p. 445.

<sup>16</sup> *Essays in Taxation*, 8th ed., p. 368.

tend to weaken or make it more difficult. Assuming that this would be the result, it may be answered that, even so, the inefficiency and inequalities in local assessments arising from lack of central control become, with the adoption of separation, matters of little consequence from the standpoint of state finance, for the local assessments are, of course, no longer used as a base of state taxation. If it be thought, however, that the state cannot so easily throw aside its responsibility for securing efficiency in local tax methods, the state may reintroduce a small direct tax on the basis of local assessments. This would not be an abandonment but only a modification of the principle of separation.

### Classification

Prominent among existing movements for tax reform in the states is that for a departure from the uniform rule of the general property tax through a classification of the objects of taxation. In the first part of the nineteenth century when property was largely tangible and homogeneous, there was little need for classification, and the uniform rule seemed to be just and equitable. Unfortunately, this rule was crystallized in many of the constitutions, so that, with certain limited exemptions, the legislature has no alternative but to levy taxes at the same rate on all classes of property. Some constitutions, however, usually those adopted before the middle of the nineteenth century, do not forbid classification; while others, beginning with that of Pennsylvania, in 1873, specifically authorize the levying of taxes which shall be uniform only upon the same class.

Furthermore, different rates of taxation may be levied upon different classes of property, or some classes may be exempted from taxation altogether. The classification should not, of course, be an arbitrary one, but should be based upon a genuine distinction, and a uniform method and rate should be applied to all objects properly falling within the same class. The economic characteristics of certain kinds of property, such as mines, forests, household goods, money, credits, and other intangible personality naturally place them in separate categories.

One of the best known examples of the beneficial results of reasonable classification is found in the low tax levied on certain forms of securities. This form of property cannot stand the high rate usually levied under the general *ad valorem* system, and consequently most of it stays in hiding and escapes the assessor. In a number of states mortgages are exempted from taxation, and, when taxed in others, it is usually found that the burden of the tax rests upon the mortgagor and not upon the mortgagee, the amount of the tax being included in the interest charge. This amounts in effect to double taxation upon the borrower in those states where no deduction for indebtedness is allowed.

In order to avoid some of the difficulties experienced in the taxation of mortgages, New York adopted in 1906 the plan of levying a recording tax upon mortgages at a low rate. These taxes are examples of new special taxes which the states have recently adopted as independent sources of revenue. The most widespread example, however, of such special state taxes is the inheritance tax, which has now been adopted in about forty states. In most of these states the tax is a graduated or progressive tax and rests upon the estates of decedents passing both to direct and to collateral heirs. In other states, however, collateral inheritances only are taxed. In 1913 the total yield from this tax in all the states having it was only about \$26,000,000, or less than one-fifth of the amount that Great Britain raised from this tax in the same year. The scantiness of yield is due in part to the low rate, partly to the high exemptions, and partly to difficulties of administration in connection with the estates of non-resident decedents.

Many of the new special state taxes, such as the low tax on intangible wealth, represent an attempt to reach the income of property as the basis of taxation rather than the property itself. Theoretically, a state income tax is the least objectionable form of state taxation, for income is usually a better test of taxpaying ability than property. The principal difficulties in the administration of the tax have been due to the lack of central control of the assessments and to limitations of state jurisdiction with

respect to incomes of nonresidents and incomes derived from extra-state sources.

The verdict that the income tax, while good theoretically, is impossible practically, must be revised in view of the successful operation of the Wisconsin income tax law of 1911. Among the principal features of this law are that the tax is levied upon both individuals and corporations, and that it was introduced as a substitute for the tax on intangible personalty. Taxes upon tangible personalty may be deducted from the amount of the income tax to be paid. The most interesting feature of the law, however, and that which distinguishes it from other state income tax laws, is the provision for central control of assessments. The administration of the law is placed in the hands of the state tax commission, which appoints, subject to civil service regulations, the income tax assessors in each of the forty-one assessment districts into which the state is divided. It is this feature of centralized administration which has saved this law from the same fate as has befallen the other state income tax laws. In the first year of the administration of the law it yielded a revenue of about three and one-half million dollars. A large part of the proceeds is distributed among the counties and local taxing districts.

The enactment of the Federal income tax law of 1913, instead of interfering with the operation of state income tax laws, may strengthen their enforcement by making available for the use of state authorities the information contained in the schedules filed under the Federal law. It may be doubted, however, whether it is worth while to maintain two expensive organizations or administrative staffs for the performance of the same function. If the United States Government can administer an income tax more efficiently than the states, the wiser plan might be for the national authorities to assume the administration of the entire income tax system, a part of the proceeds to be apportioned to the states. The same consideration applies to the inheritance tax.

Many of the difficulties experienced in the operation of state tax laws are due to the fact that the state is attempting to tax

objects which are interstate or nation-wide in character. The economic life of the nation is no respecter of state lines. Railroad systems and large industrial corporations operate in many states. This suggests the need for coöperation in tax matters between the various states concerned, or, better still, coöperation between the states and the National Government. The latter government is better fitted to administer efficiently a number of taxes now levied by states, such as income, inheritance, and corporation taxes. Just as obvious advantages result from state assessment of interlocal property, so similar advantages would be derived from national assessment of interstate property. Since the states, however, could not well afford to be deprived entirely of the revenue from these sources, a portion at least of the proceeds would have to be distributed among them.

### State Supervision of Local Accounts

We have seen that, inasmuch as the state general property tax is tacked on to the local taxes, the states have a direct interest in local tax administration and have therefore created some degree of central supervision over local assessments. The states also have an interest in the accuracy of local accounts and in the efficiency of local financial methods. Numerous cases of fraud and embezzlement in the management of public funds by local financial officers have occurred from time to time in different states. To these conditions the state government cannot be indifferent, not only because of its general interest in all that affects the financial well-being of the local governments within its borders, but also because lax, inefficient or fraudulent methods on the part of local financial officers may adversely affect the state's own revenue. Some taxes, particularly the state surtax on the general property basis and also usually the inheritance tax, are collected in the first instance by local officials and pass through the hands of county officials, by whom they are transmitted to the state treasury. State audit of local accounts, therefore, is desirable in order to safeguard the interests of the state itself.

The original, and still largely prevalent, method of exercis-

ing state control over local finances was through the mere enactment of constitutional and statutory provisions, without the use of administrative supervision. This is still generally true in respect to the incurring of debt by local governments. In some states, however, such as Texas, Massachusetts, and Oklahoma, some degree of administrative supervision over local debts is exercised through the provision requiring that cities issuing bonds shall have them certified by the state auditor or other state bureau or official. Within the last few decades, moreover, state administrative supervision over local accounts has developed in many states.<sup>17</sup> Such supervision is sometimes exercised by the existing state fiscal officers, such as the comptroller or auditor; sometimes a special officer or board is created for the purpose. The powers of the state administrative authority vary considerably. Sometimes they are very slight, consisting merely in the function of recommending a system of uniform accounting when requested to do so, or of examining the local accounts and making suggestions as to desirable changes in form or method, or of receiving reports and publishing them. In other cases, however, the power of the state bureau or department is mandatory.<sup>18</sup>

### State Accounting Methods

In many respects the methods of keeping state accounts are less advanced than in the case of private and municipal corporations. The public funds are in charge of the state fiscal officers, the state treasurer and the auditor or comptroller, who

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<sup>17</sup> The history of this movement is traced by J. A. Fairlie in his *Local Government in Counties, Towns and Villages*, pp. 255-263. See, also, F. N. Stacy, *State Supervision of Public Accounting in Minnesota*, *Proceedings of the Minnesota Academy of Social Sciences*, 1909, III, pp. 136-148; L. W. Lancaster, "State Supervision of Local Indebtedness," *National Municipal Review*, March, 1924, pp. 158-165; W. Kilpatrick, "State Supervision of Municipal Accounts," *ibid.*, May, 1923, pp. 247-254.

<sup>18</sup> Cf. C. F. Gettemy, "The Function of the State in Relation to the Statistics of Municipal Finances," *Publications of the American Statistical Association*, 1912, XIII, p. 348ff. It is to be noted that the function of collecting and disseminating information is also performed by the United States Census Bureau, which publishes at intervals the financial statistics of state and local governments.

are provided for in the constitution, selected usually by popular vote, and frequently have no special expert qualifications for the performance of their duties. The methods of handling the public funds still show in many states traces of the primitive conditions which existed before the middle of the nineteenth century. Some of the state revenues are usually collected by local officers and transmitted by the county collector or treasurer to the state treasury. The expense of collecting the revenue in this way sometimes consumes a large percentage of the gross proceeds. Greater and more effective state administrative supervision over the records and accounts of local officers intrusted with the collection of state taxes is needed in the interests of economy and efficiency. Other state revenues are paid directly to state officers charged with receiving them. They do not, however, in all cases go directly into the state treasury. Different state officers, having primarily other than financial duties to perform, such as the secretary of state, the insurance commissioner, the attorney-general and various examining and licensing boards, frequently have financial functions also through their power to collect certain state taxes or to collect fees for the services which they perform. In some states all such fees are required by law to be paid into the state treasury, but in other states they are utilized in paying the expenses of maintaining and operating the respective offices, and only the remainder, if any, is paid into the state treasury. The revenues received from various sources are covered into the treasury and placed either in a general fund or in special funds. When placed in a special fund, the money cannot ordinarily be used for any other purpose, even though there may be a surplus in one fund and a deficiency in another.<sup>10</sup> When the amount of the appropriations for a given fiscal period has been determined, and the amount of the revenue receivable by the state from all sources except taxes (*i.e.*, the direct property

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<sup>10</sup> "The existence of funds separate from the general fund, and the commitment of certain revenues of the state to specific classes of expenditures is a confusing and objectionable feature of state finance." See "Annual Message of Governor Whitman of New York," 1916, p. 8; "Message of Governor Withycombe of Oregon," 1915.



tax) is approximately known, the tax rate may then be determined by mathematical computation. In some states the rate is determined by law, but in others by a state board or official. In Illinois, for example, this board consists of the governor, state treasurer, and auditor of public accounts.

The custody of state funds is controlled in the various states in accordance with one or both of two different plans or methods, known as the independent treasury or vault system and the depository system. Under the former, the funds of the state are kept in its own vaults, while, under the latter, they are kept in certain designated banks. During the first half of the nineteenth century the independent treasury system was the more common one, but of late years it has been abandoned in most of the states. Most of the states follow the depository plan. The depositories are named in different ways, sometimes by law, but more often by the governor, treasurer, state board of deposit or other board. In the independent treasury states, the states not only derive no interest from the funds, but are put to expense in order to safeguard the money. Furthermore, the funds are withdrawn from circulation. On the other hand, some of the depository states have lost some money through the failure of the banks. This contingency, however, is now generally guarded against by requiring the banks to furnish adequate security for the safety of the funds intrusted to them.

Some attempts have been made in recent years to bring about a more effective system of accounting in the management of state finances. The development of state supervision over local accounts has had a reflex influence in improving those of the states. Many of the laws providing supervision of local accounts provide also for the inspection of state accounts. Most of the states have now adopted some plan of uniform accounting. In spite of the progress that has been made, it cannot be said that any state has yet established a central department having adequate powers of control over all the financial operations of the state.<sup>20</sup>

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<sup>20</sup> Cf. C. R. Miller, "Observations on State Financial Methods," *National Municipal Review*, November, 1921, p. 547.

State Expenditures <sup>21</sup>

One of the striking phenomena of the present day is the increasing cost of government and the mounting tide of public expenditures. This is especially true in the case of the states, where expenditures have increased during recent years more rapidly than population or than the assessed valuation of property. Campaigns have been waged upon the issue of economy and retrenchment, but administrations elected upon this issue have found themselves powerless to stem the tide toward lavish expenditures. Governors have frequently sounded notes of warning in legislative ears, but without avail. The productivity of existing sources of revenue is increasing less rapidly than expenditures, which necessitates the finding of new sources of revenue or the more economical spending of that derived from existing sources.

The increase of state expenditures does not necessarily indicate the existence of extravagance or useless spending, for the increase in expenditures measures roughly the increase in the activities which the states carry on. Some functions formerly performed, if at all, by the local governments have frequently been assumed by the states, while the latter have also taken on new functions not previously performed at all. At the same time, there has been a rapid extension in the scope of existing state functions. The larger proportion of the state funds are now being expended upon what may be called the

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<sup>21</sup> Governmental cost payments of all the states for expenses of general departments during 1919 are classified by the Bureau of the Census as follows:

(In thousands of dollars)

General government .....	\$52,151
Protection of persons and property .....	34,102
Development and conservation of natural resources .....	24,359
Conservation of health and sanitation .....	14,403
Maintenance of highways .....	61,628
Charities, hospitals and corrections .....	134,056
Education .....	184,492
Recreation .....	1,211
General .....	36,254

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Total ..... \$542,661

In 1922, total governmental cost payments were \$1,280,319,000.

developmental functions, such as education and charities. There is, however, a noticeable increase in the sums necessary to carry on the newer regulative functions. Nevertheless, while this increase of expenditures is to a considerable extent due to a legitimate growth of state activities, combined with the increase in the supply of gold and other general causes, it is undoubtedly due also in part to graft, extravagance, uneconomical methods and the multiplication of useless boards and officers. At present much state money is wasted annually through unwise or excessive appropriations. This is due in large measure to the haphazard method of enacting appropriation bills and to the lack of an adequate system of budget making. The waste of public funds, however, cannot be laid entirely at the door of the appropriating authority, but some responsibility for this condition must also be laid upon the administrative disbursing authorities. The unnecessary duplication of labor, the uneconomical purchase of supplies, and the mismanagement of administrative work tend largely to increase the high cost of government.

Economy in expenditure cannot be fully attained so long as each state department, board and institution separately purchases its own supplies. The money appropriated for the use of various state institutions has heretofore frequently been more than necessary for the reason that each such institution was allowed separately to purchase its own supplies. Not only did this allow room for occasional favoritism in awarding contracts, without sufficient scrutiny on the part of any central state official, but it also divided the power of spending the state money into so many hands that higher prices had to be paid for necessary supplies. Moreover, frequently insufficient care was taken in checking up the deliveries of supplies so as to make sure that they were in accordance with the specifications. These conditions, however, have been somewhat remedied by the creation in a number of states of boards of control of all charitable and correctional institutions, thus concentrating the fiscal management of such institutions in the hands of a central body, with the consequent increased economy in the purchase of supplies. In order to secure economy in respect to this class

of expenditure as well as to secure a better quality in the supplies purchased, some states have gone a step further by creating a central purchasing agency for the state.<sup>22</sup>

The great increase in state expenditures which has taken place within recent years has directed attention anew to the problem of the more economical management of state finances. Since the causes of this increase are many and varied, the situation can hardly be greatly improved by any one line of attack, so long as the other causes of the increase are not eliminated. Yet much may undoubtedly be accomplished by the introduction of more effective machinery for keeping watch over expenditures. In this connection we find that the questions of economy and efficiency are closely bound up together. The object of more economical management is not necessarily any great reduction in aggregate expenditures, but rather the securing of a larger return on the average for each unit of expenditure. In other words, the goal is mainly not a reduction of, but greater efficiency in, expenditures.

For the purpose of reaching this goal, two possible lines or methods of procedure may be adopted. The first method is to centralize power over expenditures in the hands of the governor, who, it will be remembered, is a political officer as well as the head of the state administration. The second method is to eliminate politics as far as possible from state expenditures by deconcentrating control over them and placing power in the hands of several separate boards constituted in such a way as to make them as nonpolitical bodies as possible. The first of these methods, which seems to be the more promising, will be discussed in connection with the state budget.

### The State Budget

A budget, in the sense in which that term is properly used, may be described as a comprehensive financial program, containing a complete plan of proposed expenditures and estimated revenues for the ensuing fiscal period, submitted by the execu-

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<sup>22</sup> A. E. Buck, "The Coming of Centralized Purchasing in State Governments," *National Municipal Review*, supp. February, 1920; A. G. Thomas, *Principles of Government Purchasing* (New York, 1919).

tive for the approval of the legislative branch of the government. As long as the expenditures of the state governments were comparatively low, no great need for such a budget scheme was generally felt. But when, in recent years, expenditures mounted so high as to make insufficient the existing sources of revenue, the attempt has been made to seek relief not only through the creation of new sources of revenue, but also through a more unified control over expenditures and a more systematic correlation of expenditures and revenues. The initiative in matters of appropriation has heretofore been largely in the hands of legislative committees, each committee considering separately and without adequate publicity a particular field of expenditures. Under these conditions, the pressure of local interests and logrolling methods of legislation inevitably produce waste and extravagance in the expenditure of the public funds. The only apparent escape from this evil is by placing the initiation of the budget in the hands of the chief executive, who represents the state as a whole and general, rather than special or local, interests.

The positive legal power of the governor to initiate a budget has been greater than his actual exercise of power. A number of state constitutions authorize him to submit "measures" for the consideration of the legislature, while others provide more specifically that he shall present to that body at the beginning of each session "estimates of the amount of money to be raised by taxation for all purposes."<sup>28</sup> Such provisions, however, have frequently either been ignored or utilized in a merely perfunctory manner. This is probably due in part to the disintegration of state administration. The independence of the various state administrative officers from control by the governor enables them to ignore him and to go directly to the legislature with their requests for appropriations. Those administrative officers who are closely allied politically with the party or faction having control of the appropriation committees are naturally more likely to have their requests granted without regard to their real needs. This practice is out of harmony with the principles

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<sup>28</sup> *E.g.*, Constitution of Illinois, Art. V, Sect. 7.

of orderly administration, and entirely incompatible with the making of a scientific budget. The comparatively short term of the governor and his election in the even years are conditions which also adversely affect the strength and continuity of the governor's control over the budget. If the governor is to be given the power to prepare and transmit to the legislature a budget, he should be allowed sufficient time in which to prepare it before it comes up in the legislature. In order to effect this object, it has been recommended that the governor be elected in the odd years so that he may have the advantage of at least a year in office before the legislature meets, unless an emergency should require a special session to be called.<sup>24</sup>

The initiative in determining the amount and objects of state expenditure has hitherto lain largely with the legislature. This power has made that body, rather than the governor, the central controlling power over the administration. The appropriation bills have sometimes gone into minute detail, thus giving the legislature a close and intimate control over the administrative services. While some control should be exercised by the legislature over expenditures by the administrative officers in order to prevent abuses which might otherwise arise, such control should be exercised by legislative provision for careful audit of executive accounts and by full publicity as to expenditures, rather than by the device of an elaborately segregated budget. The administrative officers, by reason of their experience in the carrying on of administrative work, are in a better position than the legislature to draw up the estimates of funds needed for the support of such work. Lump sum appropriations give greater

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<sup>24</sup> *Report of the Economy and Efficiency Commission of the Commonwealth of Pennsylvania*, 1915, p. 6. To this plan, however, it may be objected that if the governor and legislature are elected at different times, they are less likely to be in political harmony. It would be better to elect both the governor and the legislature in November, inaugurate the new governor in December and postpone the opening of the legislative session until February. This would give a new governor two months in which to prepare his budget, and avoid the anomaly whereby the outgoing governor prepares the budget for the new administration. In order to provide for greater continuity of administration, the governor's term should be increased in all states where it is less than four years.

independence to the administrative officers, and tend to increase administrative efficiency and to prevent logrolling methods in the legislature. Such administrative independence is not dangerous if combined with a proper accounting system for holding the disbursing officers responsible.

Greater flexibility in expenditures might be secured by authorizing some general administrative agency to permit transfers of items within appropriations granted to any department. This has been done in some states and the result has been to secure not only greater flexibility but also more economical expenditure, since there is no longer the same pressure on the legislature to appropriate the maximum amounts asked for under each head, but only slightly more than the minimum amounts. If the amount appropriated then proves insufficient, transfers of funds can usually be made. The system of lump sum appropriations combined with executive allotments, found in some states, not only gives greater flexibility to the appropriations, but also requires the spending agency to construct a rather definite work program. It is to be remembered that a legislative appropriation, although an authorization to spend the amount specified, is not a requirement that such amount shall be spent. For the sake of economy, the governor should not only be able to prevent any spending agency from incurring deficits (which is a form of self-appropriation), but should also be able to direct expenditures, so as to prevent those which appear to be unnecessary, even though funds for the purpose are available through legislative authorization.

The governor has sometimes been confined to the negative function of vetoing items, or, in one or two states, of reducing items in appropriation bills. The veto power alone has proven to be an insufficient instrument to enable the governor to construct a complete financial program. We thus put the cart before the horse. The governor should have the initiative and the legislature the veto, in the case of appropriation bills. Some improvement has been made in recent years, however, through the enactment of laws designed to put in motion administrative agencies for collecting and compiling estimates and transmitting them to the legislature for its information.

Although such laws constitute a step in advance, they are seriously deficient in that they provide in the main merely for the collection and transmittal of financial estimates to the legislature, which do not, as a rule, represent the authoritative recommendation of a responsible state officer, based upon a broad survey of the financial needs and resources of the state. Furthermore, the estimates, as transmitted to the legislature, are frequently based almost entirely upon the statements of financial needs made by heads of departments and other administrative officers, without adequate and disinterested examination by experts outside the departments concerned. The need for an intelligent revision of the departmental estimates, based upon accurate information, should be provided for.

The budget should be prepared and compiled under the supervision of the governor, as head of the administration, and, when completed, should be transmitted by him to the legislature with his backing and authority as a statement of the financial needs of the various administrative departments for which he assumes the responsibility. The effectiveness of a budget prepared under administrative supervision and transmitted by the governor to the legislature depends to a considerable extent upon the relations between the governor and the legislature. Even if the budget so transmitted has no legally binding force upon the legislature, it may be very effective if the governor is recognized as the political leader of the party in control of the legislature. Under these circumstances, greater weight will naturally be attached to his recommendations and more effective coöperation between the executive and the legislature will be possible. Some states have attempted to give a legal sanction to such coöperative action by providing that the budget shall be drawn up by a board composed of members of both the legislative and executive branches of the government. Such a method of joint action fits in, perhaps, with less disturbance to the general framework of state government than a purely executive budget, but its effectiveness depends on the existence of special conditions, which cannot always be expected.

Other states have made the budget authority a board or commission composed entirely of administrative officers. The gov-



error is usually a member of this board, but may not be able to control it. The tendency, however, in state budget laws is decidedly in the direction of concentrating authority in the hands of the governor.<sup>25</sup> A distinction, however, must be made between the law and the practice. In some states having a budget law of the executive type, the governor may fail to assume any responsibility for the estimates, while, in other states, even though no budget law were on the statute books, the governor might introduce a fairly effective budget system of the executive type.

The comparative ineffectiveness which has been experienced in the operation of most of the schemes for a state budget hitherto adopted has gradually led to the conclusion that more radical changes are necessary in order to accomplish a real reform. In countries having a real budget, such as Great Britain, the Cabinet officers are in practically complete control of the finances, and the executive exercises such control in some of the large cities of America. It is to be remembered, however, that in Great Britain the Cabinet officers having charge of the finances are also members and leaders of the legislature. On account of the prevalence of the principle of separation of powers in the organization of our state governments, it would scarcely be feasible at once to transplant British budget methods to the American states. A greater measure of executive control than is now usually found is, however, both feasible and desirable.

About a half-dozen states, beginning with Maryland in 1916, have inserted budget provisions in their constitutions, while nearly all the states now have budget laws on their statute books. The Maryland constitution provides for effective administrative supervision over the estimates and gives the governor the power to determine the maximum amounts that may be spent for the support of the state executive departments, boards and institu-

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<sup>25</sup> See table in Cleveland and Buck, *The Budget and Responsible Government*, p. 124, indicating that, up to 1920, 24 states had adopted the executive type of budget. Up to 1924, the number of states having the executive type had increased to 28, while 18 states still retained the board type of budget. A. E. Buck, "Progress in State Budget Making," *National Municipal Review*, January, 1924, p. 20.

tions. The estimated amounts necessary for the support of the judiciary and legislature are certified to the governor by the state comptroller and the presiding officers of each house respectively, and are inserted in the budget by the governor without revision, but public hearings are to be held on all estimates. The legislature may strike out items or reduce, but not increase, the amounts proposed by the governor for the support of the executive department; it may increase but not reduce those proposed for the support of the judicial department; and it may either increase or reduce the estimates for the legislature. Moreover, while the legislature may not consider other appropriation bills until the governor's budget bill has been finally acted upon, it may subsequently initiate appropriations for objects not included in the governor's budget. The exercise of this power, however, is attempted to be safeguarded from abuse by the following conditions: It can only be exercised by a three-fifths vote; it is subject to the usual power of the governor to approve or veto; and the special appropriation bill must be accompanied by provision for the levy of a tax sufficient in amount to defray the expenses necessitated by such act of appropriation. If the governor's budget bill has not been acted upon by the legislature before the end of the regular session, the governor may extend the session for such further period as he thinks necessary, and during such extension of the session no matter other than such bill may be considered.

In Illinois, each department, office and institution is required to file biennially in the office of the director of finance on uniform blanks prescribed by the director estimates of receipts and expenditures for the succeeding two years, with an explanation of reasons for each item of expenditure requested. The director of finance is empowered to investigate all items and to revise the estimates before submitting them to the governor for transmittal to the general assembly. The governor is required to submit to the general assembly not later than four weeks after its organization a state budget, embracing the amounts recommended by him to be appropriated to the respective departments, offices, and institutions, and for all other public purposes, the estimated revenues from taxation and from other sources, and

an estimate of the amount required to be raised by taxation. Thus the budget, when it reaches the general assembly, has the official support and authority of the governor, though legal control over the appropriation and revenue acts still remains largely with the legislature, subject to the power of the governor to veto appropriation items. The submission of such an official budget, backed by the authority and prestige of the governor, is an important step in the direction of more economical expenditure of state money. The experience with the system that has been had in Illinois seems to show that when the governor's budget is carefully and intelligently prepared and based on accurate and comprehensive information, the legislature, though still clothed with full legal power, will make little change in it. The matter of a budget system for the state is intimately associated with the program of the consolidation of the numerous state agencies. The scattered and disorganized condition of the administrative agencies, which has heretofore existed, has interfered with the development of a scientific budget system. The constitutional elective officers are in a position of practical independence of the governor, who cannot control the estimates nor the appropriations for their departments. "No machinery, either statutory or constitutional, will produce a single executive responsibility for the budget, so long as there is not a single executive responsibility for the conduct of the affairs of the state government."<sup>26</sup>

Moreover, the considerable number of separate agencies, and the consequently large number of separate requests for appropriations, makes it difficult for the budget-making authority to give them any adequate scrutiny or examination. There should be concentrated responsibility for the estimates, and this can properly be assumed only by the governor, as the head of the administration. If the governor is to be required to assume the responsibility for the estimates in the budget it follows as a logical corollary that he must be provided with adequate means for scrutinizing the estimates as they come to him from the heads of departments, and for giving them study and criticism,

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<sup>26</sup> Illinois Constitutional Convention *Bulletin* No. 4, p. 286. J. M. Mathews, "Administrative Reorganization in Illinois," Supplement to the *National Municipal Review*, November, 1920.

so as to prune them to the proper proportions in view of the general financial condition of the state.

The increase in the governor's control over state finances is but a means to an end, and that end is the increase in the governor's control both over the formulation of the work program of the state administrative agencies and also over the execution of that program. Control over execution involves considerable attention to details of expenditure, and, although the governor should maintain general supervision of this matter, he cannot be expected to have the time to devote much attention to details and should therefore have placed at his disposal some agency to act under his control in performing this function. This should be a staff agency rather than a spending department, in order that it may view appropriations from a more disinterested standpoint. This agency should regard budgetmaking as a continuous process rather than as a periodical undertaking. Even if created merely for the purpose of assisting in formulating the work program of the administration, such an agency should not confine its attention to the mere assembling of annual or biennial estimates of expenditures or even to the revision of such estimates, but should also maintain a careful and continuous watch and supervision over the actual expenditures of each administrative agency throughout the entire fiscal period. More specifically, it should have the power to require the spending departments to furnish at short intervals detailed statements of their financial operations set out in appropriate items. Before money issues from the treasury to be expended in the discretion of the heads of administrative departments, such expenditure should have the approval of the governor. Recent laws passed in a number of states contain provisions which go far toward meeting these requirements. Complete administrative centralization in the control over expenditures has not yet been granted, but substantial progress has been, and is being made in that direction.

In order to facilitate the compilation of the budget, the fiscal periods of the various state departments should coincide, and these, in turn, should correspond with the appropriation period. The budget plan should be the basis of the budget bill or bills. There should be as few budget bills as legally possible, in order

that it may be as comprehensive as possible, and no special or supplementary appropriation bills should be considered except under proper restrictions. The budget bill should be considered by a single legislative committee, preferably a joint committee of the two houses, rather than parcelled out among several committees. Continuing appropriations, still retained in a few states, should be abolished, as they are antagonistic to the maintenance of an orderly and systematic budget plan. All appropriations should lapse, preferably at the end of a two-year period. Another bad practice sometimes indulged in is that whereby fee-collecting agencies are allowed to retain their fees for the purpose of defraying their expenses. This leads to extravagance in some cases, and may render the agency partly or wholly independent of direct appropriations by the legislature. Strict compliance with the requirement that all fees shall be turned into the state treasury conduces to a better integration of the administrative agencies and to a more effective working of the budget system.

This plan of administrative centralization over state finances assumes that the increased power which it confers upon the governor will be exercised for the promotion of the public welfare, and this assumption rests in turn upon the further assumption that the governor can and will be held to a responsibility commensurate with his increased power. Do the means exist in most states whereby the governor can be held to this degree of responsibility? It can hardly be maintained that, from the purely legal point of view, adequate means to this end exist in most states. But the governor is the most important and conspicuous officer in the state not only administratively but also politically, and he can usually be held to a large measure of political responsibility for the record which he makes in handling the state finances.

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## CHAPTER XII

### STATE REGULATION OF BUSINESS CORPORATIONS

THE commercial, manufacturing, and transportation business of the country is to a large extent carried on by corporations, and the regulation of corporations is, therefore, one of the most important phases of the relation of the states to business and industry. Corporations are also frequently organized for purposes other than pecuniary profit. In either case, the right to be a corporation and the right to carry on operations in the corporate form are not common rights but dependent upon a grant from the state. This grant may be made either in the form of a special charter or under the provisions of a general act. At first, it was customary for the states to grant special charters. This practice, however, opened the way for legislative favoritism and corruption to such an extent that, in most of the states by constitutional prohibition, corporation charters may not be granted, amended, or extended by special act. The usual practice now is to grant corporate privileges only under the provisions of general laws. Among the most valuable of such privileges are those of limited liability and continuity of life. The stockholders in a corporation are not as a rule liable for the debts of the corporation beyond the amount of their holdings of stock. The corporation, moreover, has some of the attributes of immortality since it continues an uninterrupted existence without regard to the termination of the lives of its stockholders and officers. Although a corporation is not, for most purposes, considered to be a citizen, it is nevertheless a person and is entitled to many of the constitutional privileges and immunities attaching to persons. The most important of these are the provisions of the Fourteenth Amendment to the Constitution of the United States which prohibit the states from depriving any person of property without due process of law and from denying to any person within their jurisdiction the equal protection of the laws.

The Constitution of the United States also prohibits the states from passing any law impairing the obligation of contracts. This provision was probably intended by the framers of that instrument to apply only to private contracts. In 1819, however, the Supreme Court of the United States in deciding the Dartmouth college case,<sup>1</sup> held that the provision was broad enough to include a grant of a charter to a private corporation organized for educational purposes. The court admitted that the constitutional provision did not apply to public or governmental corporations, such as municipalities. The state is not limited by the Federal Constitution in altering or amending their charters. But the doctrine of the Dartmouth College case has been applied to private business corporations, whether chartered by special act or under general laws. The results have been unfortunate in many instances in withdrawing these corporations from such regulation by the state as would involve alteration or amendment of the terms of the original charter. Shortly after the Dartmouth College case was decided the movement for internal improvement led to the incorporation of many turnpike, canal, bridge, and railroad companies. In some instances the legislatures improvidently granted to these companies special privileges in their charters, such as exemption from taxation, which could not afterwards be altered without impairing the obligation of the contract. To a large extent, however, these unfortunate results of the decision have been remedied by the insertion in state constitutions and general laws of provisions such as that found in a Kentucky statute of 1856 to the effect that all subsequent charters or grants to corporations should "be subject to amendment or repeal at the will of the legislature, unless a contrary intent is therein plainly expressed."<sup>2</sup> Any subsequent grant is made subject to the conditions of such general statute whose pertinent terms become a part of the contract and an alteration of the grant is not deemed to impair the obligation of the contract unless it clearly appears that the grant was intended to be irrevocable. Some states go

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<sup>1</sup> 4 Wheat. 518, 4 L. ed. 629.

<sup>2</sup> Cf. *Covington v. Kentucky* (1899), 173 U. S. 231, 43 L. ed. 679.

farther and forbid altogether the granting of irrepealable charters.

The courts have shown a commendable tendency, where possible, to whittle down the doctrine of the Dartmouth College case. For the benefit of the public they have applied to legislative grants the rule of strict construction, differing in this respect from the rule applied to the construction of private contracts.<sup>3</sup> They have held, moreover, that since contracts are property, they may be taken by the state for a public purpose under its power of eminent domain by giving just compensation.<sup>4</sup> Furthermore, it has been held in a number of cases that the important police power of the state cannot be bargained away by contract, and a contract may therefore be altered by the state when legislating for the protection of health, safety, or morals.<sup>5</sup>

For purposes of administration the secretary of state is the officer usually designated to exercise general supervision over most kinds of corporations. He also issues certificates of incorporation to domestic corporations in general, and grants licenses to foreign corporations to do business in the state upon the payment of the required fees. In a few states, however, these functions are performed by the state corporation commission. In granting such certificates, the secretary of state must satisfy himself that the corporation is organized for a lawful purpose and complies with the other requirements of the general incorporation law of the state. In the case of domestic corporations organized for pecuniary profit, the promoters are usually required to file with the secretary of state information regarding the proposed company, such as the amount of the capital stock,

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<sup>3</sup> Taney, C. J., in *Charles River Bridge v. Warren Bridge* (1837), 11 Pet. 420, 9 L. ed. 773.

<sup>4</sup> *West River Bridge Co. v. Dix* (1848), 6 How. 507; 12 L. ed. 535; *Long Island Water Co. v. Brooklyn* (1897), 166 U. S. 685, 41 L. ed. 1165.

<sup>5</sup> *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 58 L. ed. 721 (1914); *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989 (1878); *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036 (1878); *Stone v. Mississippi*, 101 U. S. 14, 25 L. ed. 1079 (1879); *Butchers' Union Slaughter House Co. v. Crescent City Slaughterhouse Co.*, 111 U. S. 746, 28 L. ed. 585 (1883).

the number of shares, the location of the principal office, and other data. After incorporation, some supervision is maintained by the requirement that periodical reports be filed in the office of the secretary of state. The secretary may also obtain additional information by addressing interrogatories to the corporations. Failure to file the required reports, nonuse of the franchise or abuse of the corporate powers may work the forfeiture of the charter.

Although the secretary of state has usually some measure of discretion in the exercise of his supervision of corporations, such supervision cannot, on the whole, be said to be very effective. This is due in part to the fact that the secretary's time is largely occupied with a multiplicity of other duties, and in part to defects in the laws themselves.

The incorporation laws in some states have been so liberal as to constitute a standing invitation to companies to become organized under the laws of such states, although they might do little or no business therein. Thus, the Southern Pacific Company was granted a charter in the state of Kentucky, although it did no business in that state.<sup>6</sup> Among the most notorious offenders in this respect were New Jersey and Delaware, a large part of the revenues of those states being derived from corporation fees. During the administration of Governor Wilson, however, a series of laws was passed in New Jersey, known as the "seven sisters," which went far towards remedying these abuses. One of the most prevalent abuses in corporate management has been what is known as "stock-watering." In order to prevent this, it is now provided in a number of states that a fictitious increase of stock or bonded indebtedness shall be void, and that stock or bonds may be issued only for money paid, labor done, or property actually received. Other state laws intended to lessen corporate abuses are those forbidding trusts, monopolies, combinations in restraint of trade, and unfair methods of competition. Local price discrimination, which is one of the devices frequently resorted to by commercial corporations in order to stifle competition, is generally prohibited by law. State laws

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<sup>6</sup> Southern Pacific Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96 (1911).

regulating business, however, may not discriminate against a particular company merely because it is big, when it is not a monopoly, nor may they except producers of agricultural products or raisers of livestock from the prohibition of combinations in restraint of trade, for this would be denying to such corporation the equal protection of the laws, in violation of the Fourteenth Amendment.<sup>7</sup>

### Blue-Sky Laws

With the exception of the securities of public service corporations, no attempt was made in this country prior to 1910 to prevent, by administrative action, the fraudulent sale of corporate securities. The only remedy was an action for deceit in the courts, which could be sustained only upon proof of misrepresentation of facts. That this remedy was inadequate was shown by the fact that throughout the country many thousands of dollars of worthless stock was annually foisted upon the public by concerns having little more tangible assets than so many feet of blue sky. From the standpoint of social welfare, it is less important that a remedy be provided for the punishment of those found guilty of fraud than that legislative and administrative action be taken for the prevention of fraudulent transactions. In providing this more effective remedy, Kansas led the way through the enactment of a law in 1911 requiring all concerns selling stock within the state to file financial statements, together with such other pertinent information as might be required, with a designated state officer, who is authorized to grant a license to the company, without which it cannot sell securities in the state, if he is satisfied after examination that the concern has such tangible assets as seem to promise some return on the investment. This is no guarantee of such returns by the state and careless or unwise investments are not altogether prevented, but substantial protection is afforded the public against the operations of obviously fraudulent concerns, most of which are eliminated from the field. The officer designated by the

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<sup>7</sup> *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. ed. 92 (1901); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679 (1902).

Kansas law to administer its provisions is the bank commissioner, but in other states, such as Illinois, the secretary of state is designated, while, in some states, such as Minnesota, an *ex officio* commission of state officers is provided. Blue-sky laws are now found in about forty states.

The policy of such laws has been attacked on the ground that their tendency is too paternalistic and that the citizen should not be coddled to such an extent. But such a theory should not be allowed to prevent the taking of practical measures for remedying such a widespread evil. It may be, however, that some states have gone too far, and that the proper sphere of state action in this field is confined to insuring full information and publicity. In this connection, the Illinois law of 1919 is noteworthy. It classifies securities into groups, according to the degree of speculative character of each, and endeavors to make certain that the prospective investor will know to what group a security belongs before purchasing. There is no prohibition of the sale of any security, however doubtful, unless there is actual evidence of fraud. The state "does not try to prohibit the individual's acquiring a gold brick if he wishes, provided only that it is clearly labeled as such."<sup>8</sup>

From the standpoint of constitutionality, blue-sky laws had rough sailing at first, several of them being declared unconstitutional in the lower courts. The grounds on which they were attacked were that they constituted an undue interference with interstate commerce, delegated judicial power to an administrative officer, deprived persons of liberty or property without due process of law and abridged the privileges of citizens of the United States. In 1917, however, these contentions were negatived by the Supreme Court of the United States in a case involving the Ohio blue-sky law, holding it to be a valid exercise of the state police power.<sup>9</sup> The Illinois blue-sky law has also

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<sup>8</sup> Angell, J. W., "The Illinois Blue-Sky Law," 28 *Journal of Political Economy*, April, 1920, p. 318. For text of the law, see *Illinois Session Laws*, 1919, pp. 353-365.

<sup>9</sup> *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. ed. 480 (1916). See also *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559, 61 L. ed. 493 (1917); *Merrick v. Halsey & Co.*, 242 U. S. 568, 61 L. ed. 498

recently been declared constitutional by the supreme court of that state.<sup>10</sup>

### Foreign Corporations

As already indicated, corporations are not citizens and are therefore not entitled to the benefit of the constitutional guaranties relating to citizens.<sup>11</sup> They cannot invoke the interstate citizenship clause of the Federal Constitution in order to give them free entry into another state for the purposes of doing business there. Unless engaged in interstate commerce or chartered by the United States to aid in its governmental functions, a foreign corporation cannot enter another state to do business there without complying with the conditions which such state may see fit to impose.<sup>12</sup> Thus they may be required to obtain a license from the secretary of state as a prerequisite to doing business, to pay the fees required by law, and to designate an agent or attorney in fact within the state upon whom process may be served in all suits brought against the corporation.

In addition to the conditions imposed upon domestic corporations the state may place greater burdens, such as heavier taxes, upon foreign corporations than upon those of domestic creation. This right of the state is based upon the theory that since the state may exclude a foreign corporation altogether, with the exception of the two classes mentioned, it may exercise the lesser power of permitting its entrance only upon stipulated conditions. If, moreover, a foreign corporation is not seeking admission, but is already doing business in the state, it may be treated differently from domestic corporations if there is a reasonable basis for the distinction; but the courts are inclined to hold that such foreign corporation is a person within the jurisdiction and

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(1917). Cf M. J. Brown, "The Minnesota Blue-Sky Law," 3 *Minnesota Law Review*, February, 1919, pp. 149-162.

<sup>10</sup> *Stewart v. Brady*, 300 Ill. 445, 133 N. E. 310 (1921).

<sup>11</sup> An exception to this rule is that, within the meaning of the diverse citizenship clause of the Federal Constitution regulating the jurisdiction of the Federal courts, corporations are practically considered to be citizens of the state in which incorporated. *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130 (1862).

<sup>12</sup> *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 36 L. ed. 164 (1892).

cannot be subjected to arbitrary discrimination in matters of taxation, especially where it has invested within the state a substantial amount of property of a fixed and permanent character.<sup>13</sup> As pointed out above, moreover, a corporation is considered as a citizen within the meaning of the clause of the Constitution relating to the judicial power of the United States, and the state has no right to revoke the license of a foreign corporation to do business within its borders in case of removal by the corporation to a Federal court of any action commenced against it by a citizen of that state.<sup>14</sup>

### Banking and Insurance

Corporations organized for the purpose of engaging in banking or insurance were among the first to be subjected to regulation in this country, because they developed at an early period and exercised an important influence upon the economic life of the people. Most states have commissioners of banks and superintendents of insurance to whom is intrusted the supervision over such corporations. Such officers are usually appointed by the governor, but in a few, mainly Western states, are elected by popular vote. Some states still intrust the performance of one or both of these functions to the older constitutional officers, such as secretary of state or auditor. Thus, in Illinois, the auditor of public accounts supervises banks, trust companies, and building and loan associations. This arrangement was not changed by the adoption of the Civil Administrative Code of 1917, although the work of the superintendent of insurance was assigned by the Code to the department of trade and commerce. The Consolidation Commission of Oregon recommended in 1918 that the banking and insurance functions be assigned to the

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<sup>13</sup> *Southern Railway Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536 (1910); *Bethlehem Corporation v. Flynt*, 256 U. S. 421, 65 L. ed. 1029 (1921).

<sup>14</sup> *Wisconsin v. Phila. & Reading Coal Co.*, 241 U. S. 329, 60 L. ed. 1027 (1916). For further details relating to state regulation of foreign corporations, see Report of the Commissioner of Corporations on State Laws Concerning Foreign Corporations (Washington 1915), and G. C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge, 1918), reviewed by T. R. Powell, "The Changing Law of Foreign Corporations," 33 *Political Science Quarterly*, December, 1918, pp. 549-569.



proposed new department of trade and commerce,<sup>15</sup> and identically the same recommendation was made three years later by the Joint Legislative Committee of Ohio on Administrative Reorganization.<sup>16</sup>

The supervisory work of these departments consists in general in the examination of assets, the inspection of books, records and documents, and the requirement of reports, in order to determine the solvency of the companies, to prevent violations of the laws, and thus afford, in some measure at least, protection to depositors and policyholders. For these purposes the departments maintain staffs of examiners, but the number of such assistants is usually insufficient so that the examinations are likely to be somewhat hurried, and in states where civil service regulations have not been adopted, some or most of the examiners may be appointed for party reasons and may lack the expert qualifications necessary for adequate examinations. In most states we find also a state fire marshal, who is sometimes an independent officer, but is closely associated with the superintendent of insurance.

Mention may now be made of certain special considerations relating to each of these particular functions. In Illinois, until recently, private banks were subject to no regulation or supervision by the state. The result was that a number of such banks failed with considerable losses to depositors. Legislation has recently been passed, however, attempting to remedy this condition.<sup>17</sup> Even in the case of banks subject to state supervision, however, defalcations may occur and the bank may fail with loss to depositors. In order to guard as far as possible against this contingency, Oklahoma enacted a statute a number of years ago providing for the creation of a depositors' guaranty fund by assessments upon every state bank's average daily deposits. If any such bank failed, depositors were paid from this fund. The banks objected to the exaction on the ground that it took their property for private use without compensation. The

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<sup>15</sup> J. M. Mathews, Report of the *Consolidation Commission of Oregon* (1918), p. 39.

<sup>16</sup> Report of the Committee (1921), pp. 170-175.

<sup>17</sup> *Illinois Session Laws*, 1919, p. 235.

statute was upheld by the Supreme Court of the United States, however, as a valid exercise of the police power of the state.<sup>18</sup> In Wisconsin, a statute was passed which forbade the conduct of the banking business in other than the corporate form. This was objected to on the ground that it infringed the common-law right of every citizen to engage in the banking business. The supreme court of Wisconsin, however, held that banking is a quasi-public business and that, although the legislature could not prohibit its conduct, it could, under the police power, make such a reasonable regulation as the requirement of incorporation.<sup>19</sup>

The state superintendent of insurance is required to examine the assets of insurance companies, to see that their funds are invested in safe securities and, in general, to enforce the insurance laws of the state. He may issue licenses to foreign insurance companies to do business in the state, and may revoke them in case he finds they are conducting business illegally, or may secure a court order to that effect. Such companies may be required to comply with such conditions as the state sees fit to lay down before doing business in the state, such as the deposit with the superintendent of insurance or other designated officer of a certain amount of cash or securities as a guarantee fund for policy-holders or the giving of proof that a similar fund has been deposited with such an officer in another state. The rates of premium charged by insurance companies may also be regulated by the state.<sup>20</sup> A state may also exclude foreign insurance companies after they have established a business in the state, since the permission previously given to do business is not a vested right nor a contract.<sup>21</sup> The superintendent of insurance is sometimes empowered to assess and collect taxes on foreign insurance companies doing business in the state and the amount of revenue derived from this source in the larger states is usually quite extensive.

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<sup>18</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112 (1911).

<sup>19</sup> *Weed v. Bergh*, 141 Wis. 569, 124 N. W. 664 (1910).

<sup>20</sup> *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011 (1914).

<sup>21</sup> *Citizens' Insurance Co. v. Hebert*, 139 La. 708, 71 So. 955.

Following the revelation in 1905 of scandalous practices in the management of certain large insurance companies in New York, some states resorted to rather drastic regulations of the business, with the result that in two or three of these states the companies ceased to do business for a while. In Wisconsin the aim of the regulation has been largely to reduce the cost of insurance to the policy-holder, and, in order to carry out this object more fully, that state launched a few years ago an interesting experiment of state life insurance, whereby policies for small sums were issued by the state itself. The success of this experiment, however, seems doubtful in view of the comparatively small number of policy-holders and of the well-known trait of human nature not to insure against death unless solicited to do so by energetic agents.

The success of state regulation of insurance in general is not as great as might be desired, due in part to the national scope of the business. This condition would seem to point to the desirability of national regulation, but any tendency in this direction is blocked by the constitutional lack of power of the National Government over the subject. In 1869 a Virginia statute requiring foreign fire insurance companies alone to take out licenses and to deposit certain securities with the state treasurer before doing business in the state was upheld as constitutional by the Supreme Court of the United States. The grounds of the decision were, first, that corporations are not citizens and are not, therefore, entitled to the protection of the interstate citizenship clause of the Constitution of the United States against discriminatory state legislation, and, secondly, that issuing a policy of insurance is not a transaction of commerce nor, even if the parties stand in different states, is it a transaction of interstate commerce, but is a mere local transaction, governed by local law.<sup>22</sup> Although this decision has been subjected to much criticism, it has nevertheless been uniformly followed by the courts.<sup>23</sup>

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<sup>22</sup> *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (1869).

<sup>23</sup> On the general subject of life insurance regulation, see article by S. H. Wolfe, reprinted in *Reinsch's Readings in American State Government*, pp. 286-292.

### The Regulation of Railroads

Prior to the passage by Congress in 1887 of the Interstate Commerce Commission Act, such regulation as the railroads were subjected to was exercised mainly by the states. During the early period of railroad building, the activity of the states toward the railroads was eminently benevolent, such as the purchase of railroad stock with state funds, the granting of charters carrying exemption of railroad property from state taxation, the donation of public land, and other forms of state aid. Railroads are also commonly endowed with the power of eminent domain, whereby they may condemn property needed for railroad purposes. This benevolent attitude later changed, and, shortly after the Civil War, a movement which spread among the farmers of the Middle West, known as the Granger movement, led to rather drastic regulation of railroads by some of the states in that region. The railroads, controlled by non-resident Eastern capitalists, were regarded as not showing sufficient consideration for the interests of small shippers, the bulk of whom were farmers. The contest was carried to the courts where the farmers won at least a partial victory. Following out the principle enunciated in the leading case of *Munn v. Illinois*,<sup>24</sup> it was held that railroads, on account of the public nature of the business, are subject to legislative control and regulation.<sup>25</sup> It was even implied that, in the absence of regulation by Congress, the states could regulate rates for the carrying of passengers and freight within the state, even though the destination or point of departure were outside the state. In 1886, however, the Supreme Court of the United States modified its position on this point and held that a statute of Illinois attempting to do this was invalid and that the states may not regulate interstate rates at all, even though Congress has not acted.<sup>26</sup> This ruling influenced the passage in the following year of the act of Congress creating the Interstate Commerce Commission, ex-

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<sup>24</sup> 94 U. S. 113, 24 L. ed. 77 (1876).

<sup>25</sup> *C. B. & Q. Ry. v. Iowa*, 94, U. S. 164, 24 L. ed. 97 (1877).

<sup>26</sup> *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244 (1886).

tending a certain measure of national control over railroads, which has since been strengthened by various amendments.

The states, however, might still make local regulations incidentally affecting interstate commerce. Among state regulations upheld by the courts were those requiring the speed of railroad trains to be checked at highway crossings and within city limits; requiring railways to stop certain trains at places having 3,000 inhabitants or more; requiring locomotive engineers to be examined and licensed; requiring the heating of passenger cars and prohibiting the heating of passenger cars by stoves, even as to interstate traffic; and requiring three brakemen on freight trains of more than twenty-five cars. Railroads were also prohibited from granting rebates and free passes or making other discriminations for or against particular persons or localities as to charges or facilities.<sup>27</sup>

To the states, moreover, was still left, for the time being at least, the power to regulate intrastate traffic and rates. During the first decade of the twentieth century, many states enacted laws stipulating flat rates of so much per mile for the carriage of passengers between points within the state as well as regulating many other details of railway traffic. Such a flat rate, however, was hardly just in many cases, since a number of factors must be taken into consideration in determining what is a reasonable rate, which will naturally vary from one road to another. These factors were laid down by the Supreme Court of the United States in 1898 as follows:

The basis of all calculation as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under par-

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<sup>27</sup> Thus, the Illinois public utilities law of 1913 prohibited any public utility, including railroads, from granting any preference or advantage to any corporation or person as to rates, charges, services or facilities. *Session Laws*, 1913, p. 479. In this way free railroad passes, which had previously been enjoyed by members of the legislature, were abolished,

ticular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. . . . What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.<sup>28</sup>

It is obvious that a flat rate prescribed by legislative mandate would not meet all of these requirements in the case of railroads operated under different conditions and in some cases the acts were held invalid as being confiscatory and taking property without due process of law. The determination of what is a reasonable rate in particular cases as well as the administration of other railroad regulations came to be recognized as a task for which the legislatures were not well suited, and consequently administrative bodies known usually as railroad commissions, were created in various states from time to time. In New York, Rhode Island, Connecticut and Maine, these bodies were created before the Civil War. Massachusetts followed in 1869 and Illinois and Minnesota in 1871. Such bodies have now been established in practically all the states. The unlimited power to fix rates, however, cannot be conferred upon such commissions, for this would be a delegation to them of legislative power in violation of the principle of separation of powers embodied in the constitutions, nor can their decisions as to rates be made final and conclusive, for this might deprive the companies of property without due process of law.<sup>29</sup> If, however, the legislature lays down the general rule that the rates must be reasonable, the determination of what constitutes a reasonable rate in particular cases may be left to the commission, subject to an appeal from its decision to the courts.

The question as to the extent of the power of the state commission over intrastate railroad rates came up prominently in the Minnesota Rate cases, decided in 1913 by the Supreme

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<sup>28</sup> *Smyth v. Ames*, 169 U. S. 466, 546, 42 L. ed. 819.

<sup>29</sup> *Chicago, M. & St. P. Ry. Co. v. Minnesota ex rel. Railroad and Warehouse Commission*, 134 U. S. 418, 33 L. ed. 970 (1890).

Court of the United States.<sup>80</sup> Here, the state commission had ordered the reduction of freight and passenger rates for intrastate carriage. This order was attacked on the ground that its incidental effect upon interstate rates to competing points in adjoining states would be tantamount to regulation of interstate commerce by the state. This contention having been upheld by the Federal Circuit Court, the case was carried on appeal to the Supreme Court of the United States. The latter court, however, speaking by Mr. Justice Hughes, reversed the decision of the lower court and held that the intrastate rates fixed by the Minnesota commission were valid.

Although the general principle was thus established that the states have full power over intrastate rates subject only to appeal to the Federal Courts in cases where the state rate is alleged to be confiscatory in violation of the Fourteenth Amendment, this principle has recently been subjected to some modification. In the Minnesota case the effect of the order of the state commission upon interstate rates was too indirect to render it invalid, but interstate and intrastate commerce are often very closely blended, and if the effect of discriminatory state action on interstate rates becomes too direct, such action may be set aside. This is what happened in the Shreveport rate case,<sup>81</sup> decided in 1914 by the Supreme Court of the United States, speaking by the same justice as in the Minnesota case. There the action of the Interstate Commerce Commission in granting increased intrastate rates where the state commission had refused to do so and where such rates substantially affected interstate rates was upheld. Again, in 1917, it was held that Congress could vest the Interstate Commerce Commission with authority to remove discriminations against interstate commerce by directing a change of an intrastate rate prescribed by state authority.<sup>82</sup>

When the extraordinary demand for transportation arose in-

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<sup>80</sup> 230 U. S. 352-433, 57 L. ed. 1511.

<sup>81</sup> *Houston, E. & W. Texas Ry. Co. v. United States*, 234, U. S. 342, 58 L. ed. 1341.

<sup>82</sup> *Illinois Central Ry. Co. v. Public Utilities Commission of Illinois*, 245 U. S. 493, 62 L. ed. 425 (1918). The order of the Interstate Commerce Commission in this case, however, was held void as too vague and uncertain in meaning to be operative.

cidental to the entrance of the United States into the World War, the Federal Government by appropriate legislation of Congress and Executive action under the war power took over the management and operation of the railroads. Such Federal operation continued from January, 1918, to March, 1920, and, during that period, the powers of state railroad commissions were largely in abeyance. By the Transportation Act of 1920, restoring the railroads to their owners, Congress for the first time authorized the Interstate Commerce Commission to deal directly with intrastate rates where they unduly discriminate against, *i.e.*, place a burden upon, interstate commerce. This provision was upheld in the Wisconsin rate case decided by the Supreme Court of the United States in 1922, wherein the railroad commission of that state was enjoined from interfering with the maintenance of intrastate rates as fixed by the Interstate Commerce Commission.<sup>83</sup> As to the general principle involved, the court, speaking by Mr. Chief Justice Taft, declared that the orders of the Interstate Commerce Commission fixing intrastate rates where those fixed by state authority are found to be unduly discriminatory against interstate commerce

are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority." This, as the court further points out, "does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level

<sup>83</sup> Railroad Commission of Wisconsin *v.* Chicago, B. & Q. Railroad Co. 257 U. S. 563 (decided Feb. 27, 1922),



which the Interstate Commerce Commission has found to be fair to interstate commerce."

In spite of this limitation on the power of the Interstate Commerce Commission, however, the powers of the states and of their railroad commissions over intrastate rates have been substantially reduced by these decisions. That the tendency should be in this direction seems inevitable in view of the essentially national, or at least interstate, scope of commerce.

### The Regulation of Public Utilities

Although railroads constitute the most important single public utility, there are many other businesses which are affected with a public interest and are therefore subject to public regulation according to the principle laid down in the case of *Munn v. Illinois*.<sup>84</sup> Among the more important of these businesses are street railways, including subways and elevated roads, gas, water, electric light and power and telephone companies. These are mainly urban utilities. In order to engage in such businesses it is necessary to secure a franchise granted under public authority. This is because the use of public property, such as the streets, is generally necessary, and such use could not be allowed as a matter of common right. Franchises are usually granted by the city under authority derived from the state, and constitute a method of regulation by contract which may subsist in addition to other forms of regulation.<sup>85</sup> The power of granting

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<sup>84</sup> 94 U. S. 113, 24 L. ed. 77 (1886). It has been held that "aside from statutory definitions, the term public utility implies a public use, carrying with it the duty to serve the public and treat all persons alike, without discrimination, and it precludes the idea of service which is private in its nature, whether for the benefit and advantage of a few or of many. The words public use mean of or belonging to the people at large, open to all the people to the extent that its capacity may admit of the public use." *State Public Utilities Commission v. Bethany Mutual Telephone Assn.*, 270 Ill. 183, 110 N. E. 334.

<sup>85</sup> A distinction, however, is sometimes made between the power to regulate and the power to contract. A city may change its regulations, but cannot abrogate its contract, provided it was validly entered into. *City of Detroit v. Railway Co.*, 184 U. S. 368, 46 L. ed. 592 (1902). To some extent, regulation by state commission and by municipal contractual franchise are inconsistent. See "Suggestions of John H. Gray to the Department on Regulation of Interstate and Municipal Utilities

franchises has been greatly abused by cities, and this has led to rather stringent constitutional or statutory restrictions being placed upon its exercise. Formerly, franchises were sometimes granted in perpetuity, but later were generally restricted to a term of years, and, more recently, the indeterminate franchise has been introduced. Public utilities are also usually natural monopolies, and, for this reason if for no other, require public regulation; since competition cannot be relied upon as a regulative force. Without such regulation the public would probably in most cases be charged high rates for inferior service. A member of the public who feels aggrieved might bring suit in the courts against the utility company. But the method of control by lawsuit is very defective. Most customers of a public utility would hesitate to undergo the expense of a legal contest with the company, and even if a suit were brought, the court would be powerless to grant general relief, or to act as to future abuses, except in a negative way.

Where the individual invasions of private rights are slight, but where when taken together they constitute a serious subversion of private rights, the only adequate method of regulation is through an administrative authority specifically charged with that duty.<sup>30</sup>

Legislative control over public utilities, whether by state legislature or by municipal council, has also proved inadequate. The legislature can lay down general rules, but the detailed regulation of utilities is essentially a problem of an administrative character. Only an administrative body can secure the necessary data and exercise the constant supervision over utilities which is required for adequate control. There is some question, however, as to whether urban utilities should not be left to regulation by the localities immediately concerned rather than by the state. It is argued that the local authorities are better acquainted with local conditions, and that any injection of state control over

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of the National Civic Federation on Local Franchises in Relation to State Authority," 1912, p. 8; R. E. Heilman, "The Municipality and its Local Utilities," *Proceedings of the Second Annual Convention of the Illinois Municipal League*, 1915, p. 23.

<sup>30</sup> Goodnow and Bates, *Municipal Government*, p. 388.

local public utilities is a violation of the principle of municipal home rule. There would seem, however, to be a place for state regulation even though local regulation is retained for some purposes. Some so-called local utilities really extend beyond the boundaries of the city and cannot therefore be subject to adequate regulation by the city. Moreover, the state has more extensive resources at its command and can meet the utility companies on more nearly an equal footing than can any except the larger cities. Consequently, for the smaller cities at least, state administrative intervention would seem to be necessary.<sup>87</sup>

In Massachusetts there was established in 1885 a Board of Gas Commissioners, whose name was shortly afterwards changed to the Board of Gas and Electric Light Commissioners. This board was distinct from the state Railroad Commission.<sup>88</sup> In the majority of states, however, the jurisdiction of the existing state commission dealing with railroads was enlarged so as to include a number of other public utilities and its name was usually changed to the public service commission or similar designation so as to indicate the enlarged scope of its functions.<sup>89</sup> Commissions with these wider powers over urban utilities generally as well as over railroads were established in 1907 in New York and in Wisconsin. Since then the movement has spread until similar bodies are found in practically every state. In some states the members are elected by popular vote, but in a majority of the states they are appointed by the governor with the consent of the senate, and the latter would seem to be, on the whole, the more satisfactory method. Some states prescribe qualifications for public service commissioners, and a greater number lay down disqualifications, such as ownership of the securities of the utilities over which the commission has jurisdiction.

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<sup>87</sup> This point is further discussed below, p. 367.

<sup>88</sup> By the reorganization act of July 23, 1919, these bodies were consolidated into one department of public utilities, consisting of a board of five members appointed by the governor with the consent of the council for overlapping terms of five years each.

<sup>89</sup> For example, this was what happened in New Jersey. See J. M. Mathews, "The New Jersey Public Utilities Law," *American Political Science Review*, May, 1910, pp. 240-242.

The powers of public service commissions are now generally mandatory in character, differing in this respect from some of the early railroad commissions which had advisory or recommendatory functions only, and depended on publicity as the means of enforcement. They do not merely investigate and report but can order things done. Publicity, however, is still a useful means of control, and, for this purpose, the commissions are usually given power to inspect the books and papers of the utility companies and to subpoena and require the testimony of the officers or employees of the companies with reference to any matter connected with the business. Many commissions have also the power to prescribe the form in which the accounts and reports of the companies shall be kept in order to make this form of control more effective. Another power frequently granted to the commissions is that of supervising the issuance of stocks and bonds by the utility companies so as to prevent as far as possible the injection of "water" into these securities, or, in other words, to prevent the amount of outstanding securities from being substantially greater than the amount actually invested in the business.

As already pointed out, public utilities are, in many instances, natural monopolies. The public service laws usually frankly recognize this fact and undertake to prevent "sandbagging" and "paralleling" or unnecessary duplication of equipment where the result will not be in the long run for the benefit of the public. In order to accomplish this purpose, the laws provide that before a company may start a new utility or extend an existing one, it must first obtain from the commission a certificate of convenience and necessity. A further recognition of the monopolistic character of public utilities is contained in the provision found in some states, notably Wisconsin, for the indeterminate permit. The usual custom has been to grant franchises for a definite number of years, but under the indeterminate permit provision, franchises are granted practically during good behavior and no franchise for a competing utility is granted, unless the commission, after hearing, decides that public convenience and necessity require it. The municipality in which the utility is located, however, has the option of purchasing the plant at a valuation fixed

by the commission, subject to judicial review. The existence of this power in the municipality has the effect of placing the utility company on its good behavior and the power will consequently not ordinarily need to be exercised. It has sometimes happened, however, that the commission has placed an exorbitant valuation upon the utility property in order to prevent municipal ownership.

Among the most important powers granted to the commissions are those relating to rates and service. The rate-making power is a part of the police power of the state and cannot be contracted away by the legislature. Consequently that body may fix or change the rates to be charged for a public service even though the franchise of the company allows it to charge different rates. Conditions governing the determination of equitable rates for public service in different localities vary to such an extent, however, that the legislature contents itself with laying down the general rule that rates must be reasonable, and leaves it to the commission to exercise the administrative power of fixing, within these general limits, the rates to be charged in particular cases. This has sometimes been attacked in the courts as an unconstitutional delegation of legislative power, but the courts have denied this contention.<sup>40</sup>

In practice, rates are usually fixed in the first instance by the utility companies and schedules of such rates must be filed with the commission. The latter body may then, on its own motion or upon complaint, make investigation as to their reasonableness. In determining what are reasonable rates in particular cases, various factors must be taken into consideration, among the most important of which is the fair value of the property. In order to secure such a basis for the exercise of the rate-making power, many states, notably Wisconsin, have authorized the commissions to make a valuation of the property of public utility concerns. An automatic method of ratemaking has been

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<sup>40</sup> *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Railroad Commission of Wisconsin*, 136 Wis. 146, 116 N. W. 905, quoted by former Governor McGovern of Wisconsin in his address before the Conference of Governors, 1911, *Proceedings*, pp. 183ff.

introduced in some places, notably as to gas in Boston, through the device known as the "sliding scale." The gist of this plan is that for every reduction in the rate charged for the service, the company is allowed a corresponding increase in the rate of dividends which may be declared. The rate allowed should be high enough not only to yield a reasonable return upon the investment but also to enable the utility to furnish adequate service. The character of the service rendered by the company is, in fact, from the standpoint of public benefit, more important than the rate. Although standards of service are sometimes laid down by legislative enactment, they are more usually left to be prescribed by action of the commission. The commissions generally maintain an inspectional force for determining whether the service furnished is reasonably adequate, but frequently this force is not sufficient to enable the commission to perform this function in an effective manner.

The orders of the commissions as to rates and service are not, as a rule, final but subject to judicial review. The powers of the commissions are, for the most part, derived from legislative enactment, and their acts are, therefore, subject to judicial review as to their constitutionality just as are the acts of the legislature. Even where the powers of the commission are derived from the state constitution, they may be attacked on the ground that some provision of the Federal Constitution is infringed. The provision usually invoked in this connection is the due-process clause of the Fourteenth Amendment.<sup>41</sup> Judicial review of the commission's findings, however, may be more extensive than in the case of legislative acts, for the latter may be reviewed only when there is a question of constitutionality involved, while the former may be attacked in the courts on the ground that they exceed the statutory authority of the commission. There is a tendency, however, to consider as final the

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<sup>41</sup> The Supreme Court of the United States has declared that the only federal questions open in complaints against orders of state public service commissions are whether "there was such a want of hearing or such arbitrary or capricious action on the part of the commission as to violate the due process clause of the Constitution." *New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 62 L. ed. 337 (1917).

determinations of the commissions as to matters of fact.<sup>42</sup> In order to discredit the findings of the commissions the utilities have sometimes withheld essential evidence when the case was before the commission and have secured a reversal of the commission's order by disclosing such evidence when the case is appealed to the court. In order to prevent this, the laws now sometimes provide that if new evidence is introduced before the court, the case is automatically remanded to the commission for the revision of its former decision in the light of the new evidence. Ordinarily, the taking of an appeal to the courts does not of itself suspend the order of the commission, but such suspension may be ordered by the court after hearing and upon the execution of a bond by the company to cover damages caused by the delay in the enforcement of the commission's order, in case it is sustained by the court. In spite of these precautions, however, the possibility of appeal to the courts is an important means at the disposal of the companies for thwarting the commissions and wearing out the patience of the public. In some states, appeals are carried directly to the state supreme court, but in others, on account of constitutional limitations it is necessary for appeals to go first to the circuit court. Thus two and, if a Federal question is involved, three courts may be appealed to, and the enforcement of the order of the commission, even if finally upheld, greatly delayed.

Companies operating public utilities now quite generally operate in more than one city and sometimes in as many as a hundred cities scattered over an extensive portion of the state. Such interurban utilities cannot be effectively regulated by the various localities in which they operate and control through a state commission seems almost necessary. Such control is also necessary for the regulation of local utilities in the smaller

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<sup>42</sup> The Supreme Court of the United States, however, has recently held that due process requires a right of court review in which the court exercises "independent judgment as to both law and facts." *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 64 L. ed. 908 (1920). But three justices dissented, basing their opinion on the different rule applying to the decisions of the Interstate Commerce Commission. *Interstate Commerce Commission v. Union Pacific Ry. Co.*, 222 U. S. 541, 56 L. ed. 308 (1912).

cities, which are not financially able to support effective commissions. State commissions, as a rule, have wider facilities at their disposal and are able to employ abler experts. The larger cities, however, can afford to have their own public utility commissions. Los Angeles established such a commission in 1909 and similar bodies have since been created in a number of other cities. Such bodies are desirable in the larger cities even though a state commission exists. A division of labor between the state and municipal commissions may be worked out so that, as has been suggested, the former would regulate corporate finances and accounting and enforce safety provisions, while the latter would regulate the service and the use of the streets, while still other matters, such as the adjustment of rates, might be determined by the coöperative action of the two authorities.<sup>43</sup> Where a state contains one very large city within which there are peculiarly difficult problems of utility regulations to solve, the plan adopted in the New York law of 1907 contains many advantages. This plan provides for two commissions, both appointed by the governor, one of which is empowered to regulate utilities in Greater New York while the other functions in the remainder of the state.

One question which arises in connection with the relation between the state and cities in the regulation of utilities is that as to the power of the state commission over utilities which are owned and operated by cities. In most of the states the law does not place municipally owned utilities within the jurisdiction of the state commission, but in a few states they are placed within the jurisdiction of the commission either as fully as are privately owned utilities or else to a limited extent. There was formerly some doubt as to the constitutionality of excepting municipally owned utilities from the jurisdiction of the state commission, but this doubt has now been set at rest by the Supreme Court of the United States. The public utilities law of Illinois made such an exception,<sup>44</sup> and the provision was attacked by the privately owned utilities on the ground that, when the municipality is engaged in a proprietary business, it

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<sup>43</sup> Goodnow and Bates, *Municipal Government*, p. 388.

<sup>44</sup> *Session Laws*, 1913, p. 465.



is to be considered for that purpose a private corporation, and to except it from the operation of the statute would be a denial of the equal protection of the laws to privately owned utilities, in violation of the Fourteenth Amendment. In the Springfield case, however, the Supreme Court of the United States declined to take this view and held that the two types of corporations are sufficiently different to justify the different treatment which the law accords them.<sup>45</sup>

There is little doubt that state regulation of public utilities has been justified by the results. It is true that there has been a tendency in some states for the governor to appoint mere politicians on the commissions, which has naturally diminished the usefulness of these bodies. This has been especially noticeable in recent years and is one of the most serious defects of public utility regulation. Not having the technical training to qualify them for the position, members of the commissions have not given adequate attention to the solution of the technical problems connected with scientific ratemaking, financial policy, fair valuation and economical management of utility properties.<sup>46</sup> Few serious students of the question, however, would go so far as to advocate the abandonment of regulation altogether. On the whole the results seem to have been beneficial. Rates may not have been reduced very much, and in some cases increased rates have been allowed by the commissions. But in many states service has been improved, discriminations have been largely eliminated, and the companies have been, to a considerable extent, if not entirely, driven out of politics.

If regulation of public utilities should fail, there is no thought of retrogression to the condition of no regulation, but the next step would probably be public ownership and operation. Many

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<sup>45</sup> *Springfield Gas and Electric Co. v. City of Springfield*, 257 U. S. 66, 66 L. ed. 38 (1921). Cf. P. Overton, "The Regulation of Municipally owned Public Utilities," 7, *Cornell Law Quarterly*, April, 1922, pp. 191-201.

<sup>46</sup> Cf. J. Bauer, "Deadlock in Public Utility Regulation" 10 *National Municipal Review*, Sept., Oct., Nov., 1921, Jan., 1922; J. B. Sanborn, "The Essentials of a Sound Policy as to Public Utilities," 107, *The Economic World*, Feb. 26, 1921, pp. 296, 297.

persons are of the opinion that public regulation is merely the transitional stage to public ownership. Some hope and others fear that regulation may operate as a stop-gap against public ownership. But the movement towards public ownership has already made some progress. This has been mainly in the direction of municipal ownership of water plants. Recently, some cities have begun to take over other forms of public utilities, and even some states have made tentative beginnings in the same field. Thus, by constitutional amendments adopted in 1917 and 1918, the state governments of North Dakota and South Dakota were authorized to own and operate various public utilities and industrial enterprises. Carrying out the policies of the Nonpartisan League, North Dakota created an industrial commission, composed of the governor, attorney-general, and commissioner of agriculture and labor, with power to operate all utilities and industries owned or administered by the state except those in the penal, charitable, and educational institutions. The plan included a state-owned bank, grain elevators, and flour mills. The bank was authorized to loan money to the farmers of the state at cost on warehouse receipts for grain and other good security. The movement in favor of state-owned cement plants to combat the high cost of this material in those states that have undertaken an extensive program of construction of hard-surfaced roads received some impetus by the adoption of a constitutional amendment in South Dakota in 1918 authorizing that state to engage in the manufacture of this product. The constitutionality of the socialistic experiment thus undertaken by these states has been upheld by the courts.<sup>47</sup>

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<sup>47</sup> *Scott v. Frazier*, 258 Fed 669; *Same v. Same*, 253 U. S. 243 (1920); *Green v. Frazier*, 253 U. S. 233 (1920).

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## CHAPTER XIII

### STATE LABOR LEGISLATION

AN important phase of the police power of the state, in both its social and economic aspects, is that which embraces the regulations adopted by the state for the betterment of the conditions of labor. The individualistic doctrine of *laissez faire*, which predominated in Anglo-Saxon countries during the greater part of the nineteenth century, retarded the development of state intervention in this, as in other, fields. Such intervention was deprecated at that time on the ground that it would tend to abridge the freedom and to stifle the initiative of the individual. Although this view still has much influence with some of the state courts, it has long been discarded by the law-making bodies of this country, as is evidenced by the constantly accumulating mass of legislation dealing with labor conditions. Such legislation may constitute theoretical limitations upon individual freedom of contract, but, practically, it is not necessarily anti-individualistic. As has been well said, "legal limitations upon freedom to do certain things may, and in all proper social legislation will, result in a real increase in individual freedom and independence."<sup>1</sup> Some reaction against this new view was experienced during the World War, due to the notion that the advanced social legislation in Germany was in some way responsible for the brutal national selfishness exhibited by that country. It is now realized, however, that the reprehensible policies of the German Government were due to its autocratic and irresponsible character rather than to German legislation for social betterment.

The Supreme Court of the United States and the more progressive state courts have also largely discarded the doctrine of *laissez faire*, as applied to the field of labor legislation. The

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<sup>1</sup> W. F. Willoughby, "The Philosophy of Labor Legislation," *American Political Science Review*, VIII, p. 19 (1914).

importance of the former court in passing finally upon the constitutionality of state legislation has been increased by the act of Congress of 1916 widening the right of appeal from the state supreme courts so as to allow such right where a Federal question is involved, whether the state court passed adversely upon it or not.<sup>2</sup> In spite of the more liberal attitude of the courts toward social legislation, questions of constitutionality are still of great importance, and a number of labor laws have been held void, even within recent years, as infringing the limitations of the Constitution. The most important of these limitations is that found in both Federal and state constitutions to the effect that no person shall be deprived of "life, liberty, or property without due process of law." The Thirteenth Amendment has also been of some importance in connection with reactionary labor legislation. The labor contract differs from certain other kinds of contracts in that its specific performance by the laborer cannot be compelled, as this would be involuntary servitude in violation of that Amendment.<sup>3</sup>

### Conditions of Work

With the introduction of the factory system and the development of modern industry, bringing about great concentration of laborers in industrial establishments, the matter of health and safety of the workers became of pressing importance. In recognition of the fact that the workers, on account of the inferior economic position which they have hitherto occupied, would not, as a rule, be able to secure proper conditions of work without governmental aid, the states have enacted many measures to regulate such conditions. These have had reference mainly to hazardous or unhealthful occupations and to the employment of women and children. In order to enforce the duty of the employer to furnish reasonably safe places for work, laws have been passed for the installation of safety appliances, such as the placing of guards around moving parts of machinery. Protection against fire is aimed at by requirements for fire

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<sup>2</sup> 39 St. at L., 726.

<sup>3</sup> *Arthur v. Oakes*, 63 Fed. 310 (1891); *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191 (1911).

escapes, for doors opening outwardly, and for periodical fire drills. For the protection of the health of the workers, factories and workshops are required to be properly lighted, heated, and ventilated, and kept generally in a sanitary condition. On account of the peculiarly hazardous nature of mining, special regulations are made with reference to the operation of mines, such as the requirements for ventilation, the use of safety lamps, and the construction and operation of cages.

In addition to regulating the conditions in work places maintained by the employers, some attempt has been made to improve conditions where work is carried on in the home or tenement of the worker. This is known as "sweating." New York took a tentative step in this direction in 1885 by enacting a law prohibiting the manufacture of cigars in tenement houses in New York City. The court of that state held it invalid, however, on the ground that it had no relation whatever to the public health.<sup>4</sup> A system of licensing sweatshops was afterwards introduced in New York and other states but has not proved very effectual. In general, however, laws enacted for improving the conditions under which work is carried on have been upheld as valid exercises of the police power of the state for the protection of the safety and health of employees.

On account of the weaker physique of women and minors and their greater liability to suffer injury from the conditions found in factories and workshops, it has been deemed advisable to enact special regulations for their protection. Thus, nearly all states require suitable seats for women in mercantile establishments. In many states women are prohibited altogether from engaging in certain kinds of employments, such as work in mines. Laws for the prohibition of a class of persons from engaging in work, however, are aimed principally at minors of tender years. Since children are wards of the state and do not possess full freedom of contract, there is no doubt as to the constitutional power of the state to control the conditions of their employment. Nearly all states place restrictions to some extent upon the employment of children, either barring them

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<sup>4</sup> *In re Jacobs*, 98 N. Y. 98 (1885).

altogether from certain kinds of gainful occupations, or prohibiting them from entering any employment until they have reached a certain age, ranging from fourteen to sixteen. The object of such laws is not only to prevent the stunting of the growth of children from premature labor, but also to give them the opportunity to acquire at least the rudiments of an education. Unfortunately, the instrumentalities provided for the enforcement of these laws are in most states ineffective. There should be greater coöperation in the enforcement of these laws between the administrative agencies of the department of labor and the school authorities engaged in the enforcement of the compulsory attendance laws.

In order partly to prevent the employment of children in states where it is not prohibited by state law and partly to establish a uniform rule in the states generally, Congress enacted an anti-child-labor law in 1916, prohibiting the transportation in interstate commerce of the products of establishments in which children were employed. The act, however, was held unconstitutional by the Supreme Court on the ground that it was not properly a regulation of interstate commerce.<sup>5</sup> Congress then attempted to reach the same evil through the exercise of its taxing powers, levying a prohibitive tax of ten per cent upon the annual net profits of establishments in which children were employed. This act, however, was also declared unconstitutional by the Supreme Court, on the ground that, under the guise of a tax, it was in reality a regulation of child labor, which by the Tenth Amendment is reserved to the states.<sup>6</sup>

### Hours of Labor

In states where child labor is not altogether prohibited or where the children are above the age limit specified in prohibitory laws, their hours of work are generally limited by law to eight or ten per day. Compulsory school attendance laws, even if not supplemented by anti-child-labor laws, may have the indirect effect of limiting the hours of child labor. There is no question as to the constitutionality of laws limiting the hours

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<sup>5</sup> *Hammer v. Dagenhart*, 247 U. S. 251; 62 L. ed. 1101 (1918).

<sup>6</sup> *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

of labor for children. A number of years ago, Oregon passed a statute prohibiting the employment of children under sixteen years of age more than ten hours a day. The law was attacked as a violation of the due-process clauses of the Fourteenth Amendment and the state constitution. It was upheld, however, by the supreme court of the state, on the ground that minors "are not *sui juris*, and can only contract to a limited extent. They are wards of the state and subject to its control. As to them the state stands in the position of *parens patriæ* and may exercise unlimited supervision and control over their contracts, occupation and conduct."<sup>7</sup>

In many states laws have also been passed limiting the hours of labor of women from eight to ten a day and from forty-eight to fifty-four a week. These generally extend to work in manufacturing and mercantile establishments and sometimes a list of other occupations is added. A hard and fast limitation of this sort, however, will not suit equally well the conditions found in different industries and occupations. Moreover, it is difficult to draw up a list of all occupations in which women's hours should be limited that will be sufficiently inclusive for any length of time. Hence, some states have adopted the method of laying down in the law the general principle that women may not work for excessive or harmful periods, and imposing upon the state industrial commission the duty of fixing the number of hours in particular industries in accordance with this principle.<sup>8</sup> Such fixation of hours by a commission has been upheld as not violating the requirement of due process as long as a fair hearing is afforded before the commission.<sup>9</sup>

The courts have, in general, upheld laws limiting the hours of labor of women. An Oregon statute of 1903 limited to ten hours a day the labor of women in factories, laundries, and mechanical establishments. This was attacked as depriving women of freedom of contract and of the equal protection of

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<sup>7</sup> *State v. Shorey*, 48 Ore. 396; 86 Pac. 881 (1906); *Cf. People v. Ewer*, 141 N. Y. 129 and *Sturges v. Beauchamp*, 231 U. S. 320; 58 L. ed. 245 (1913).

<sup>8</sup> "Regulation of Women's Working Hours in the United States," 1918, 8 *American Labor Legislation Review*, pp. 339-343.

<sup>9</sup> *Stettler v. O'Hara*, 69 Ore. 519, 243 U. S. 629; 61 L. ed. 937 (1917).



the law. In 1908 the Supreme Court of the United States finally held the law constitutional as a valid exercise of the police power for the protection of the health of women. The physical difference between the sexes, the court said, was sufficient to justify a different rule as to hours of labor, and such protective legislation seemed necessary to enable women to secure a real equality of right. The court took judicial notice of social facts indicating the injurious effects of long hours of labor upon the health of women.<sup>10</sup> In 1915 the same court also upheld the more drastic California statute limiting the labor of women in certain industries to eight hours a day and forty-eight hours a week, as a reasonable exertion of protective authority within the domain of legislative discretion.<sup>11</sup> Within recent years the courts of most of the states have also become more liberal in their attitude toward hour legislation for women.<sup>12</sup>

Hour legislation for men, or for workers generally without regard to sex or age, has been of comparatively slow growth. It developed first in hazardous employments, such as mining, and in public work. As early as 1898 the Supreme Court of the United States decided in favor of the validity of a Utah statute which prohibited the employment of workmen in mines for more than eight hours a day.<sup>13</sup> The act was admittedly a limitation upon the legal freedom of contract, but the court held that such freedom was not absolute but subject to the lawful exercise of the police power of the state for the protection of the health of a class of workers engaged in an industry which the legislature had reasonable ground to believe was detrimental to health if too long pursued. The court also took cognizance of the fact that the workers, although legally equal with their employers, are economically unequal in bargaining power and

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<sup>10</sup> *Muller v. Oregon*, 208 U. S. 412; 52 L. ed., 551 (1908).

<sup>11</sup> *Miller v. Wilson*, 236 U. S. 373; 59 L. ed., 628 (1915).

<sup>12</sup> As illustrations of this, compare *People v. Schweinler* (1915), 214 N. Y. 395; 108 N. E. 639, overruling *People v. Williams* (1907), 189 N. Y. 131, 81 N. E., 778, holding invalid a statute prohibiting night work for women; and *Ritchie v. Wayman* (1910), 244 Ill. 509, 91 N. E. 695, upholding a ten-hour law for women, although the same court had held an eight-hour law invalid in *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454 (1895).

<sup>13</sup> *Holden v. Hardy*, 169 U. S. 366; 42 L. ed. 780 (1898).

such laws restricting the absolute freedom of contract are necessary in order to put the mine proprietors and the laborers on an equal plane in dealing with each other. The increasing power of labor unions since 1898, however, has given this argument somewhat less force than it formerly had.

Labor on public work is frequently limited by constitutional or statutory provision to eight hours per day. An adverse decision by the New York court<sup>14</sup> led to the adoption in 1905 of a constitutional amendment in that state specifically empowering the legislature to regulate the hours of labor and other conditions of employment on public work of the state or municipalities.<sup>15</sup> In 1903 the Supreme Court of the United States upheld a Kansas statute establishing the eight-hour day for labor on public work whether done through contract or directly by the state or its municipalities.<sup>16</sup> The legislature may also limit labor on public work to American citizens.<sup>17</sup>

The further question remains as to whether the legislature may limit the hours of labor of adult men in private employments of a nonhazardous nature. Upon this question the Supreme Court of the United States at first adopted an adverse attitude. In 1905 it held unconstitutional a New York statute which prohibited the employment of any person in bakeries for more than ten hours a day, on the ground that it was "not, within any fair meaning of the term, a health law, but an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best."<sup>18</sup> As to whether it was properly a health measure, however, the court substituted its own judgment for that of the legislature upon a question which should have been recognized as within the domain of legislative dis-

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<sup>14</sup> *People v. Grant*, 179 N. Y. 417; 72 N. E. 464 (1904).

<sup>15</sup> Kettleborough, *The State Constitutions*, p. 999.

<sup>16</sup> *Atkin v. Kansas*, 191 U. S. 207; 48 L. ed., 148 (1903).

<sup>17</sup> *Heim v. McCall*, 239 U. S. 175; 60 L. ed., 206 (1915), upholding a New York law to this effect. But, *cf. Truax v. Raich*, 239 U. S. 33; 60 L. ed. 131 (1915), holding unconstitutional an act of Arizona forbidding the employment of more than twenty per cent of aliens by private employers employing more than five persons.

<sup>18</sup> *Lochner v. New York*, 198 U. S. 45; 49 L. ed., 937 (1905).

cretion. In his dissenting opinion, which has had great influence upon subsequent decisions, Justice Holmes said:

This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. . . . I think that the word 'liberty,' in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Twelve years later the views of Justice Holmes finally prevailed and the *Lochner* case was practically overruled by the *Bunting* case in which the Oregon ten-hour law for men employed in factories was upheld as constitutional by the Supreme Court.<sup>19</sup> This decision represents a more realistic view of labor legislation on the part of the court. It might be difficult, however, to sustain a general eight-hour law as a health measure. Where an employment is neither unhealthful nor dangerous, the state has no more right to limit hours of labor than the other economic terms of the labor contract. An attempt to do so would be an "unwarranted invasion of the constitutional liberty of private action."<sup>20</sup> Laws providing for one day of rest in seven, however, might be sustained on the analogy of Sunday legislation.

### The Payment of Wages

The conflict between the legal theory of freedom of contract and social need has also appeared in connection with the payment of wages. It is true that there have long been on the statute books of many states laws giving mechanics and laborers liens on the real or personal property benefited by their labor. But a difference of opinion has arisen as to the validity of laws which undertake to regulate the time or manner of paying

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<sup>19</sup> *Bunting v. Oregon*, 243 U. S. 246; 61 L. ed. 830 (1917).

<sup>20</sup> E. Freund, in IV, *American Labor Legislation Review*, p. 129.

wages, as well as the amount of wages to be paid. Such laws undoubtedly limit to some extent the legal freedom of contract, but such freedom, as we have seen, is subject to the exercise of the police power in proper cases, and such laws, moreover, may be necessary to secure a real equality between employer and employee. This view, however, has not been adopted by some of the state courts. Difference of opinion has arisen as to the validity of laws prohibiting the practice adopted by employers in some businesses, such as mining, of paying their employees in scrip or store orders instead of cash or legal tender. In Pennsylvania such a law was declared void on the ground that it interfered with the freedom of contract.<sup>21</sup> The Supreme Court of the United States, however, held valid a statute of Tennessee which required the redemption in cash of store orders issued by employers in payment of wages.<sup>22</sup> The court found that the act did not conflict with any provision of the constitution of the United States protecting freedom of contract. The same court adopted a similarly liberal attitude towards a statute of Arkansas which prohibited coal mine operators from using screens to reduce the amount of wages due to miners working at quantity rates. "The right of freedom of contract," declared the court, "has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety, or welfare, the same may be valid notwithstanding they have the effect to curtail or limit the freedom of contract."<sup>23</sup>

Some states have also undertaken to protect the interests of employees by regulating the time or frequency of paying wages. In an early case the California court held invalid a law requiring a monthly pay day as an interference with freedom of contract.<sup>24</sup> But in a more recent case the New York court upheld a statute of that state requiring the payment of wages semi-

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<sup>21</sup> *Godcharles v. Wigeman*, 113 Pa. St. 431; 6 Atl. 354 (1886).

<sup>22</sup> *Knoxville Iron Co. v. Harbison*, 183 U. S. 13; 46 L. ed., 55 (1901).

<sup>23</sup> *McLean v. Arkansas*, 211 U. S. 539; 53 L. ed., 315 (1909). Cf. *Rail & River Coal Co. v. Yaple*, 236 U. S. 338, 59 L. ed., 607, sustaining a similar law of Ohio (1915).

<sup>24</sup> *Johnson v. Goodyear Mining Co.*, 127 Calif. 4 (1899).

monthly in cash, at least as far as railroad corporations were concerned.<sup>25</sup> Some states have also required by law the immediate payment of employees discharged and such laws have generally been sustained, especially when applied to corporations.<sup>26</sup>

### The Minimum Wage

Probably the most important single item in the labor contract is that specifying the amount of wages to be paid. State interference in this matter goes to the very essence of the theoretical right of freedom of contract. Here again, however, the police power may be invoked in so far as it is necessary to protect the health, morals and welfare of employees from the consequences of a wage too low to enable them to purchase the minimum of subsistence. Outside of labor on public work, however, where the state may regulate wages as a proprietary function, the prescription of minimum wages by the states has been confined to women and minors. These classes of employees have been most in need of protection because their wages have been lowest; there is a greater proportion of unskilled workers among them and their unions have been weaker than those of adult men.

Beginning with Massachusetts in 1912 more than a dozen states have enacted minimum wage laws. In a few of these states the laws undertake to specify the exact figures but usually the determination of the minimum is left to administrative action, the legislature contenting itself with merely laying down the general rule that the amount shall be a living wage or not unreasonably low. Thus, in Wisconsin the wage must be sufficient to maintain the employee under conditions consistent with his or her welfare. The administrative body intrusted with the execution of the law is either the industrial commission or a

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<sup>25</sup> New York Central & H. R. R. Co. v. Williams, 199 N. Y. 108; 92 N. E. 404 (1910). The law was also upheld by the Supreme Court of the United States in *Erie Railroad v. Williams*, 233 U. S. 671 (1914).

<sup>26</sup> St. Louis, Iron Mt. & Southern R. Co. v. Paul, 173 U. S. 404; 43 L. ed. 746; *Moore v. Indian Spring Channel Gold Mining Co.*, 174 Pac. 378. A criminal penalty cannot be provided for violation of the statute, however, as this would involve imprisonment for debt. *In re Crowe*, 145 Pac. 733.

special body known as the minimum wage commission, appointed by the governor. In addition there are frequently provided for particular industries subordinate bodies, known as wage boards, with advisory powers only, and composed of representatives of the employers, the employees, and the general public. Massachusetts adopted the plan of depending on publicity to enforce wage awards, but in other states penalties for violation are usually provided, and, in addition, employees paid less than the amount awarded may bring civil suit against the employer for the balance of wages and attorney's fees.

The constitutionality of minimum wage laws rests upon the same general principles as those on which hour legislation for women and children has been upheld. In 1914 the question first came before the supreme court of Oregon which declared valid the minimum wage law of that state.<sup>27</sup> This case was appealed to the Supreme Court of the United States, which, by an equal division affirmed the decision of the state court.<sup>28</sup> The highest courts of a number of other states, including Arkansas, Minnesota, Washington, and Massachusetts have also upheld the validity of minimum wage legislation.<sup>29</sup> These decisions are based on the ground that such legislation is proper for the protection of the health of the employees, and that the state may constitutionally interfere with the freedom of contract between employer and employee in the legitimate exercise of its police power.

The validity of minimum wage laws has now been endangered by the decision of the Supreme Court of the United States in 1923 declaring unconstitutional the minimum wage law of the District of Columbia in so far as it applied to adult women.<sup>29a</sup> The court held that women of mature age are *sui*

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<sup>27</sup> Stettler v. O'Hara, 69 Ore. 519; 139 Pac. 743.

<sup>28</sup> 243 U. S. 629 (1917). Mr. Justice Brandeis did not sit on the case since he had been of counsel in favor of the validity of the law. According to the rules of the Supreme Court in such cases, no opinion was rendered.

<sup>29</sup> State v. Crowe, 197 S. W. 4; Williams v. Evans, 165 N. W. 495; Larson v. Rice, 171 Pac. 1037; Holcombe v. Creamer, 120 N. E. 354.

<sup>29a</sup> Adkins v. Children's Hospital of the District of Columbia, 261 U. S. 525 (1923).

*juris*, and therefore not entitled to special consideration. The statute in question was held to violate the principle of freedom of contract as established by the Fifth Amendment, and the standard of a living wage set up by the statute was declared to be too vague. This was a five-to-four decision, and strong dissenting opinions were rendered, so that the doctrine of the majority is not yet thoroughly established. Even though it should be adhered to in subsequent cases, however, it does not endanger minimum wage laws of the Massachusetts type, depending on publicity for their enforcement, nor those of the mandatory type in so far as they apply merely to minors.

### Employer's Liability

With the introduction of the factory system and the multiplication of machinery, accidental injuries to employees naturally increased. If the employer did not voluntarily look after the employee in such cases, the latter had, under the common law, no other recourse than to bring suit against the employer. If he could prove that the employer had not exercised due care in providing safe conditions of work, he might recover damages. But in such litigation the courts gradually recognized certain important defenses to which the employer was entitled. The first of these was the doctrine of contributory negligence, according to which the employee could not recover if he was himself guilty of negligence, which, however slightly, contributed to the injury.<sup>30</sup> The second defense was based upon the fellow servant rule which provided that if the injury was due to the negligence of a fellow employee, the injured employee could not recover.<sup>31</sup> The third defense was that of assumption of risk, which implied that when the employee entered the employment he assumed any unusual risk which might be involved. These three common-law defenses may not have been particularly unjust at the time they originated, but, as conditions changed, they caused the odds to be so strongly against the employee that he failed to bring suit against the employers in many cases of injury, and, when he did so, he seldom recovered

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<sup>30</sup> *Butterfield v. Forester*, 11 East, 60 (1809).

<sup>31</sup> *Farwell v. Boston and W. R. Co.*, 4 Metc. 49 (1842).

damages. Employers frequently adopted the plan of protecting themselves against damage suits by taking out liability insurance in private companies, and the latter employed expert legal talent in defending any suits that might be brought, while the plaintiffs in such cases were not as a rule financially able to secure similar representation. The result was that the great burden of accidental injuries fell almost entirely upon the workers and their dependents. The feeling grew that this condition should be remedied by positive legislation so as to throw the burden of industrial injuries upon the industry and thereby indirectly upon the community as a whole. Accordingly, in all but a very few states, the three common-law defenses mentioned above have been abolished by statute, and provision made for workmen's compensation without the necessity of a lawsuit.

### Workmen's Compensation

Although a beginning was made in Maryland in 1902, the first important workman's compensation law was passed in New York in 1910. This act was partly elective and partly compulsory, that is, employers in certain lines of industry might come under it at their option, while in others, deemed to be especially dangerous to workmen, the employers were required to comply with the provisions of the act. The common-law defenses were abolished and no lawsuit or proof of negligence on the part of the employer was required, but a stated scale of compensation was to be paid by the employer, depending on the nature and extent of the injury. In 1911 the New York court, although conceding the right of the legislature to abolish the common-law defenses, declared the act unconstitutional on two grounds: (1) the provision dispensing with suit for damages at common law deprives the employer of the constitutional right to have a jury fix the amount which he shall pay when the liability to pay has been decided against him; and (2) the act deprived the employer of property without due process of law because it required him to pay compensation irrespective of negligence on his part, thus imposing upon him "liability without fault."<sup>22</sup>

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<sup>22</sup> *Ives v. So. Buffalo Ry. Co.*, 201 N. Y. 271; 94 N. E. 431 (1911).



Had the decision in the Ives case stood, it would have rendered adequate workmen's compensation legislation impracticable, because it failed to harmonize with the economic theory upon which such legislation is based, namely, that industry should bear the financial burden of all industrial accidents happening in the course of production of its finished product, just as it bears the expense of replacing worn-out and broken machinery, rather than that the loss should fall entirely upon the workers who happen to be the victims of particular accidents; such burden to be considered by the employer in fixing the price of the finished product and thus passed on to the community at large. Since many accidents happen which are nobody's fault, the question of fault is immaterial, but the fact of injury, unless wilfully inflicted, should entitle the victim to suitable compensation.<sup>33</sup>

The decision in the Ives case was "recalled," however, by an amendment to the constitution of New York, adopted in 1913,<sup>34</sup> and in the following year the legislature of that state enacted a compulsory compensation law. Nearly all the states have now passed compensation laws, although they differ considerably in their detailed provisions. On account of such constitutional objections as those mentioned in the Ives case, most of the early laws were elective. Most of the elective laws, however, contained provisions, known as "club legislation," whereby employers who failed to come under the law were deprived of the common-law defenses of contributory negligence, negligence of a fellow servant, and assumption of risk. This feature was attacked on the ground that it made the law practically compulsory and therefore unconstitutional. This contention, however, was denied by the courts,<sup>35</sup> and compensation laws which are not only practically coercive but legally compulsory have now been upheld by the Supreme Court of the United States. In 1917 the New York compulsory law was held valid by that

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<sup>33</sup> *Bulletin of the Industrial Commission of Ohio*, Jan. 1, 1915, p. 3; Workmen's Compensation Report, Senate doc. 419, Sixty-Third Congress, 2nd Session.

<sup>34</sup> Kettleborough, *The State Constitutions*, p. 972.

<sup>35</sup> *Borgnis v. Falk Co.*, 147 Wis. 327; 133 N. W. 209 (1911); *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349; 97 N. E. 602 (1912).

court on the ground that, although no doubt limiting to some extent the freedom of contract between employer and employee, it was nevertheless a legitimate exercise of the police power of the state for the protection of the health, safety and welfare of an important class of individuals.<sup>36</sup> The same court has also held that a state may make a workmen's compensation statute compulsory for coal mines, although elective for other enterprises except railroads, which are excluded entirely. The peculiar conditions of labor in coal mines were held to justify special treatment, while the exclusion of railroads was upheld on the ground that many of the injuries to railroad employees come within the Federal employers' liability act.<sup>37</sup>

With the exceptions of interstate commerce, farm labor and domestic service, the tendency of compensation laws is to cover all employments, although in a few states the statutes are limited to hazardous occupations. The amount of the compensation varies from one-half to two-thirds of the wages received at the time of the accident. In many states certain steps have been taken towards the vocational rehabilitation of disabled workmen.

When the employer was required to pay compensation for accidents to his employees and the duty was made absolute, without regard to any fault on his part, he naturally resorted to insurance in order to render this risk calculable. In order to make the payment of compensation secure, many states required employers to take out insurance or to give proof of financial responsibility. At first the insurance was generally taken out in private companies, and this is still the plan in many states. Some states, however, have now established a state insurance fund, out of which compensation in case of accident

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<sup>36</sup> *New York Central Ry. Co. v. White*, 243 U. S. 188 (1917). This law had previously been upheld by the New York court in *Jensen v. Southern Pacific Co.* 109 N. E. 500 (1915).

<sup>37</sup> *Lower Vein Coal Co. v. Industrial Board of Indiana*, 255 U. S. 144; 65 L. ed., 383 (1921). In Arizona, the injured employee was given the option, after injury, to accept compensation or to sue for damages. This was objected to as imposing liability without fault, and without restriction as to the amount, but was upheld by the Supreme Court of the United States in the *Arizona Employers' Liability Cases*, 250 U. S. 400.

is made. The expense of maintaining the fund is borne either by the state, the employers, or by the employees and the state contributing in certain proportion. The state may have a monopoly. The latter plan has been adopted in Ohio, Oregon, Washington and a few other states. The advantages of monopolistic state insurance, as administered in Oregon, have been thus outlined:

Employers and workmen are coming to realize that under the exclusive state fund method of handling workmen's compensation insurance, (1) there is no element of profit, and therefore no incentive to discourage just claims or to be illiberal in making awards; (2) that the elimination of the economic waste of agents' commissions benefits both employers and workmen; and (3) where representatives of employers and workmen have opportunity, through conference committees, as is now the practice in Oregon, to determine what changes or improvements are to be made from time to time in the compensation law, it provides a splendid field of mutual interest, not only as to details of the compensation law, but also in the other important field of accident prevention."<sup>88</sup>

The constitutionality of the exclusive state fund acts of Washington and Ohio has been upheld by the Supreme Court of the United States. In the Washington case the court declared that, under its police power for the promotion of the health, safety and general welfare of the people, the state has a "wide range of discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration," and that, within this discretion, the state "may require that the human losses shall be charged against the industry, either directly . . . or by publicly administering the compensation and distributing the cost among the industries affected."<sup>89</sup> The Ohio case presented a somewhat different point. An act passed by that state in 1917 abolished the system of private compensation, and established the exclusive state fund system. An employer who had a contract of indemnity with a private insurance company contended that the act im-

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<sup>88</sup> W. A. Marshall, chairman of the Oregon Industrial Accident Commission, quoted in (1920) 10 *American Labor Legislation Review*, December, 1920, p. 259.

<sup>89</sup> *Mountain Timber Co. v. Washington*, 243 U. S. 219 (1917).

paired the obligation of his contract, but the court declined to yield to this contention and upheld the validity of the act, saying: "The law expressed the constitutional and legislative policy of the state to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions."<sup>40</sup>

### Collective Bargaining

Workmen have organized themselves into unions in order that, through combination, they may reduce the inequality of bargaining power between themselves and their employers. Such organizations are subject to the antitrust laws and have been declared to be suable in the Federal courts and their funds subject to execution in suits for torts.<sup>41</sup> The principal weapons which they employ in the industrial struggle are the strike, and its corollary, picketing, and the boycott. Every workman has a legal right to quit work when he wills, unless he does so before the expiration of a time contract, in which case he may be held liable for the payment of damages. But an agreement among a combination of workmen to quit work simultaneously may not always be legal. The courts are not agreed upon this question, but, in general, it may be said that the strike is legal if intended primarily to ameliorate the situation of the employees as to wages, hours, or conditions of work, but that it is illegal if intended as a means of compelling the employer to operate his shop according to the wishes of the union, such as the use of union material only. The difficulty consists in determining which is the primary motive involved when both motives are present, as usually happens, and this leaves much to the discretion of the particular judge trying the case.

In order to win the objects sought to be accomplished by a strike, it is necessary for the workmen to prevent the employer,

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<sup>40</sup> *Thornton v. Duffy*, 254 U. S. 361 (1920), affirming *same v. same* 24 N. E. 54 (1918).

<sup>41</sup> *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922).

as far as possible, from securing others to fill their places. For this purpose, picketing is resorted to. This may consist either in peaceful persuasion or in intimidation by threats or violence. The distinction between these two aspects of picketing, however, is difficult to draw. Some courts have held that there is no such thing as peaceful picketing and that it is always unlawful.<sup>42</sup> If conducted in considerable numbers it is very likely to amount to unlawful intimidation, and a rough rule has therefore been formulated that there can be only one picket at each entrance to the plant.

When strikers attempt to interfere with the running of the plant through picketing and through destruction of property, the employers frequently apply to the courts for injunctive relief, on the ground that the injury may be irreparable and a lawsuit for damages would not be an adequate remedy since the strikers are generally without means. Such injunctions are usually granted and this constitutes one of the most effective weapons at the disposal of the employers, since strikers found violating the injunction are summarily punished for contempt of court, without trial by jury. The use of injunctions in labor disputes has naturally aroused the hostility of labor unions, and they have endeavored to secure legislation prohibiting the courts from issuing them. In order to prevent the courts of Arizona from enjoining peaceful picketing and the boycott, a statute of 1913 enacted in that state prohibited interference by injunction between employers and employees, in any case growing out of a dispute concerning terms or conditions of employment, unless necessary to protect property from injury by violence.<sup>43</sup> This provision was declared unconstitutional by the Supreme Court of the United States, as in violation of the guarantees of due process and equal protection of the laws found in the Fourteenth Amendment.<sup>44</sup>

A boycott may be either primary or secondary. The former

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<sup>42</sup> *Atchison, T. & S. F. Ry. v. Gee*, 139 Fed. 582; *Moore v. Cooks', Waiters' & Waitresses' Union* No. 402, 179 Pac. 417.

<sup>43</sup> Revised Statutes of Arizona, 1913, par. 1464.

<sup>44</sup> *Truax v. Corrigan*, 257 U. S. 312 (1921). This was a five to four decision.

consists in the united refusal by members of a labor union to patronize an employer whom they consider unfair to labor. The latter consists in a concerted attempt by the union to prevent third persons from patronizing such an employer. The secondary boycott is in practice the more important kind. In most states, the boycott has been held illegal, since it involves a conspiracy to injure the employer's business. It is not so much used as formerly. This is doubtless due to the influence of the Danbury Hatters' case, in which heavy damages were levied upon individual members of the hatters' union on account of losses sustained through a boycott conducted by the officers of the union.<sup>45</sup>

The right of an employer to discharge an employee on account of membership in a labor union has been upheld by the courts. A number of states have passed laws prohibiting discharge or a threat to discharge on this account. The Kansas statute to this effect, however, was declared unconstitutional by the Supreme Court of the United States.<sup>46</sup>

### The Settlement of Industrial Disputes

The conflict between capital and labor has led to such numerous and widespread industrial disturbances that the government, in the interests of the public, has deemed it desirable to provide

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<sup>45</sup> *Loewe v. Lawlor*, 208 U. S. 274; 52 L. ed. 488; 235 U. S. 522. This case was a damage suit under the Sherman Antitrust Act of 1890. But by the Clayton Act of 1914, Sect. 6, it was provided that the antitrust laws should not be construed to forbid the existence and operation of labor unions nor to restrain industrial members of the union from lawfully carrying out its legitimate objects. In 1922, the Supreme Court declared that labor unions are suable in the Federal courts, and that their funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (decided June 5, 1922). This case, taken together with the Danbury Hatters' case, indicates that the members of labor unions are suable both as a body, and as individuals without the limited liability which attaches to stockholders in a corporation.

<sup>46</sup> *Coppage v. Kansas*, 236 U. S. 1. Cf. *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436 (1908), where a similar act of Congress with reference to employees in interstate commerce met the same fate, on the ground that it was an arbitrary interference with liberty of contract.

some means for their settlement. Thus in many states are found boards of arbitration and conciliation consisting of representatives of the employers and employees. If applied to, the board may mediate between the parties to a controversy and endeavor to bring about an amicable settlement. For this purpose they may, and sometimes must, hold hearings and make investigations. Inasmuch as, under the constitutional doctrine of individual liberty, the parties to such a controversy have usually been regarded as not subject to coercion by the government when a failure to agree on the terms of the labor contract brings the wheels of industry to a stop, the instrumentalities provided by the states for the settlement of disputes may ordinarily be resorted to or not, at the option of the parties. Furthermore, as in the case of arbitration between sovereign nations, neither party is legally compelled, as a rule, to submit to the decision of the board, if dissatisfied therewith, although, in some states, compliance with the award may be enforced by court order, if the parties have previously agreed to arbitration. This method of settling industrial controversies has not proved very effective. It yields too much to the susceptibilities of the immediate parties to the controversy and does not sufficiently take into consideration the interests of the "party of the third part," that is, the general public.

In view of the general failure of voluntary arbitration, some efforts have been made to render more effective and energetic the state instrumentalities provided for the settlement of industrial disputes. Thus, a Colorado law of 1915 conferred upon the industrial commission of that state power to compel a hearing in such disputes and to prevent strikes, lockouts, and any change in the terms of employment until after the hearing and award of the commission.<sup>47</sup> The most striking advance towards compulsory arbitration, however, was made by the Kansas statute of 1920 creating the court of industrial relations,<sup>48</sup> composed of three persons appointed by the governor. The court is authorized, on its own motion, to investigate disputes in cer-

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<sup>47</sup> *Colorado Session Laws*, 1915, Chap. 180.

<sup>48</sup> Cf. H. W. Humble, "The Court of Industrial Relations in Kansas," *Michigan Law Review*, May, 1921, pp. 675-689.

tain important industries declared to be affected with a public interest, which include, in addition to those ordinarily so classified, those concerned with the production and distribution of food, fuel, and clothing. Through the aid of compulsory process issued by the district court, the court of industrial relations can compel witnesses to appear and testify. Under the act, injunctions may be issued to officials of labor unions forbidding the calling of strikes, although there is no restriction upon individuals quitting work. Picketing and boycotts are also prohibited. In case of emergency, the court may take over and operate an industry. Unless reversed by the state supreme court, the decisions of the court of industrial relations as to wages and other terms of the labor contract, are binding upon the parties. The act raises interesting constitutional questions,<sup>49</sup> and marks an important step towards establishing the theory that, as Governor Allen of Kansas has said, the public has rights in an industrial controversy affecting the production and distribution of the necessities of life and it is not a mere private war between capital and labor.<sup>50</sup> This interesting experiment in settling industrial disputes, however, has now apparently been practically terminated by the decision of the Supreme Court of the United States declaring the Kansas act void as in violation of the Fourteenth Amendment.<sup>50a</sup> The court implies, without holding, that supplying such necessities as food, clothing, and coal is not a business affected with a public interest, but then goes on to say that, even if it is such, it does not follow that the state can take the business over and run it. In other words, the scope of the regulation attempted was too broad.

### Convict Labor

An essential prerequisite to the reformation of the criminal is that he should not remain idle during confinement. The

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<sup>49</sup> It was declared constitutional, in part, by the supreme court of Kansas in *State v. Howatt*, 107 Kan. 423, 191 Pac. 585; but the more important provisions of the act were not involved in that case.

<sup>50</sup> H. J. Allen, *The Party of the Third Part* (New York, 1921), p. 107.

<sup>50a</sup> *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 525 (1923).



disciplinary effect of labor is recognized as an important element in fitting and educating him again to take his place as a normal, industrious member of society. A secondary object in affording work to the prisoner is that he may contribute, at least in part, to the expense of his maintenance and thus reduce the burden upon the taxpayer, and to this end his labor should be economically productive in character. The labor should also be of a kind, if possible, which affords industrial training and thus better fits the prisoner to become a productive member of society when he is released from custody.

Although the desirability of convict labor as a general principle is everywhere admitted, there is much difference of opinion and diversity of practice in the application of the principle. Difficulties arise in connection with the process of production or the conditions under which it shall be carried on, and also in connection with the distribution of the product. The Thirteenth Amendment to the Constitution of the United States recognizes by implication that involuntary servitude may exist as a punishment for crime whereof the party shall have been duly convicted. Under this theory, the productive value of the convict's labor becomes the property of the state, and may be disposed of by the state in such manner as it sees fit. The convict laborer has no legal right to compensation, but the state may, and as far as practicable should, accord it to him or to his family.

A method of disposing of convict labor which was formerly prevalent is that known as the contract system, or lease system, under which the labor of the convicts is let to contractors either at a per diem rate or on the piece-price plan. Under both the contract and the lease system, the convicts are in the employ of the contractors, but these systems differ, in that under the former the labor is usually carried on in the prison under the direction of the prison officials, while under the lease system, the contractor has greater control over the discipline of the prisoner and the direction of his work. Although the contract system is the better of the two, both are highly objectionable, and in practice have been productive of gross abuses, because the contractors are sometimes unscrupulous and, at best, have

little interest in the convict except to get out of him the largest possible amount of work.

These systems are both giving way to that whereby the laborer works for the state and not for a private contractor. This plan may take the form of labor in the construction and repair of roads and other public works. Such outdoor labor has a beneficial effect upon the health of the men, and the system of placing men in this work upon their honor, has, when operated under proper restrictions, worked well in some states. This method of working prisoners, however, is open to the objections that, if carried on in frequented places, it may hinder the reformation of the prisoners by subjecting them to the disgrace of public ridicule, and that it does not train them for any skilled occupation when released.

The state as the employer of convict labor acts under two plans or systems, known as state account and state use. Under these plans, the state prison becomes a sort of state factory or industrial plant for the production of articles either to be sold in the open market or to be used by the state, or both. When the goods thus produced are sold on the state account plan in the open market, the state thus becomes a direct competitor with free labor. Since the state is not subject to the same economic laws as private employers of labor, this competition might prove a serious injury to free labor, were it not that the total amount of prison-made goods is only a small fraction of one per cent of the whole mass of goods produced in the country. Nevertheless, the hostility of labor unions to direct state competition in the open market has been an important influence in bringing about the introduction of the state use plan. Under this plan, prison-made goods are used in the public institutions of the state or of its political divisions.

The operation of the state use plan has not been without difficulties. Although competition with free labor is indirect, it has not been, and cannot be wholly, eliminated. The production of certain articles and certain lines of work have sometimes been excepted from the range of prison industries, apparently for no other than political reasons. In order not to compete too much with any particular line of industry, an

attempt has been made to diversify prison labor as far as possible, but this has entailed large expense in the installation of machinery and in other ways. The business management of prison industry has sometimes tended to distract the attention of wardens and other prison officials from other equally important duties. Public institutions have sometimes been compelled to pay for inferior grades of articles and supplies. State use is probably the best system yet evolved, but it is evident that it is by no means an ideal plan, and the problem of convict labor, with its vast social implications, is as yet a long way from a satisfactory solution.

### Administrative Agencies

As in the performance of every other function, it is necessary for the state to create agencies for the purpose of administering the laws regulating the conditions of labor. The technical character of this work makes it impracticable for the lawmaking body to do more than lay down the general principles of protective labor legislation. The courts, moreover, have not proved to be effective agencies for this work. The better plan has been found to be that of laying down the general principles by legislative enactment and leaving the details to be worked out in accordance with these principles by administrative agencies. Some states, such as Wisconsin, Ohio, and New York, have even gone so far as to confer on the industrial commission the power to allow variations from the labor law, provided that its general intent is preserved.<sup>51</sup>

For the purpose of coping to some extent with the problem of unemployment, many states have not only regulated private employment agencies but have also undertaken to establish free public employment exchanges.<sup>52</sup> In most states, however, these

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<sup>51</sup> "Labor Law Administration in New York," *American Labor Legislation Review*, June, 1917, p. 238.

<sup>52</sup> The state of Washington attempted to curb the abuses of private employment agencies by prohibiting them from collecting fees from workers, but the act was declared unconstitutional by the Supreme Court of the United States, *Adams v. Tanner*, 244 U. S., 590 (1917). The object of the act seems to have been to make the employer pay the fee, but the employer would probably have deducted this from the employee's wages.

agencies have not been very effective. Some states, notably California, have attempted to reduce the amount of unemployment by pushing the construction of public works at times when the demand for labor in private employment is slack.

In order to perform the various functions connected with the administration of labor laws, the tendency formerly was to create a number of separate agencies, sometimes as many as a dozen being found in a given state. This situation naturally produced overlapping of jurisdiction, conflict and lack of co-operation between the practically independent agencies. In recent years, however, the tendency has been to consolidate the enforcement of all labor laws in one agency. Thus, Illinois, by its civil administrative code of 1917, created a department of labor, under a director. In 1921 laws were passed in California, Michigan, Minnesota, Montana, Washington and other states, consolidating the various labor agencies into one department. The California act created the department of labor and industrial relations, consolidating the industrial accident commission, the commission of immigration and housing, the industrial welfare commission and the bureau of labor statistics.<sup>53</sup> This, and similar consolidations in other states, have tended to reduce the amount of friction and duplication of effort. They have also proved effective in bringing about greater coöperation between employer and employee in the enforcement of labor laws.<sup>54</sup>

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<sup>53</sup> *Session Laws of 1921*, Chap. 604.

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## CHAPTER XIV

### ADMINISTRATIVE SERVICES

THE process of centralization in state administration has proceeded along two lines. First, functions formerly exercised by the localities have been taken over by the state, or, if left primarily with the localities, have been placed under the supervision of the state; and, secondly, the state has assumed functions not previously exercised by any governmental authority. Although some of the functions previously exercised by the localities have recently been assumed by the state or brought under state supervision, most of the newer state functions fall in the second of the two classes enumerated. The assumption by the state of the second class of functions is due in large measure to the rapid rise, within the last few decades, of new and complex industrial conditions and economic phenomena. This increasing complexity of social and industrial conditions, combined with the awakening sense of social solidarity, necessitates more and more the interference of the state for the purpose of regulating and controlling the operations of business and the processes of life. The force of circumstances and the changes in those varied and manifold conditions which go to make up the governmental environment have brought on a new era of state activity. New functions are undertaken by the state as the result of an effort, partly instinctive, partly conscious, to adapt itself to changes in this environment. The assumption by the state of each successive new function has, as a rule, involved the creation of a state executive or administrative board, commission, or other similar agency, to which is intrusted the direct exercise of the function. The creation of state boards and commissions, therefore, has gone hand in hand with the development of centralization in state administration. In general, such bodies may be considered as administrative agencies created for the special purpose of enforcing

or supervising the enforcement of a particular portion of the substantive law of the state. In a preceding chapter, some of the larger considerations which concern such boards and commissions in general have been noted. In the present chapter, the special characteristics of certain particular kinds of state boards and commissions will be considered in connection with the functional activities of which they are the instruments. For this purpose there will be chosen as typical the administration of education, the administration of charities and corrections, and the administration of public health.<sup>1</sup>

### The Administration of Education

Under a democratic form of government, education must be regarded as of peculiar importance owing to the need that popular control of public policy may at the same time be intelligent. Judged both from this point of view and from that of the relative amount of public expenditure therefor, the administration of education is by far the most important function performed by the American states.

A principle which is now well recognized is that free public education is a matter of such vital importance to the general welfare and interests of the state as a whole that it cannot be safely left to the mere voluntary action of the localities, but the state itself must see to it that the children of the state receive a good common school education, either by direct action or through supervision by the state of the educational agencies and facilities supplied by the localities. In regard to these two methods of dealing with the subject, the state has in the main adopted the former method, or direct action, for the carrying on of higher and professional education, while leaving to the localities the direct management of elementary and secondary schools. Although this separation seems necessary on account of administrative and historical reasons, nevertheless the well-being of higher education cannot be disassociated from the management of elementary schools. The connection between

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<sup>1</sup>For fuller treatment of these subjects, see the author's *Principles of American State Administration* (New York, 1917), Chaps. XII, XIII, XIV.

higher and lower education is such that any widespread inefficiency in the lower grades will affect adversely the carrying on of higher education in state institutions, and disseminate an injurious influence throughout the whole system. Both, therefore, from the standpoint of the interest which the state has in the carrying on of higher education, as well as from that of its direct interest in the efficient management of elementary education, the state cannot safely allow the lower grades of education to be managed by the localities without higher administrative supervision. To effect this purpose county supervision alone is not sufficient, and the state has therefore established a central administrative authority or agency, with supervisory power sufficient to regulate and control the school system of the entire state.

### The State Superintendent

An executive or administrative head of the state school system is found in all of the states. As to the methods adopted for the selection of the state superintendent it was natural, both on account of the origin of the office and also on account of the general tendencies of the times, that popular election should have been adopted in the majority of the states. Several weighty objections, however, may be urged against this method of selection. The state superintendent should be an educational expert, but it is very doubtful whether popular election is the method best calculated to secure this result. This question is naturally involved in the broader question of introducing a short ballot for the state by making all or nearly all of the chief executive officers or heads of departments appointive instead of elective. If the selection were really made by the people as a whole, it probably would not as a rule secure experts, but it would have the compensating advantage of stimulating public interest in educational matters. But, in reality, selection by popular vote does not insure a choice by the whole people, but merely by the person or comparatively small group of persons who select the minor candidates of the party which turns out to have the plurality of votes in the election. The method of popular election of the state superintendent thus



tends to lengthen the state ballot where it should be shortened, and contains a possibility, at least, of injecting political considerations where they should not be allowed to enter.

Appointment by the governor or by the state board of education would have the advantage of making it possible to bring to the position a man from outside the state, if a better man could be secured in this way. Residence in the state is, of course, a qualification of value which ought to be considered, because, other things being equal, a resident is more familiar with the conditions with which he will have to deal. But there may be other qualifications, such as executive ability and professional attainments, which are of more importance and which outweigh the disadvantage of nonresidence. Under the system of popular election, even though residence is not prescribed as a legal qualification, a nonresident, no matter what his attainments, would seldom if ever stand any chance of securing the position. Yet, it would certainly seem that there should be no tariff wall around the state to prevent the importation of professional ability in the management of schools.

The actual influence exerted by the state superintendent may be more or less than an enumeration of his legal powers would indicate, depending largely upon the energy and ability with which he discharges his duties. He should be, both from the standpoint of legal power and from that of professional attainments, one of the principal educational leaders of the state. While there have been and are many notable exceptions, it is still too frequently true that the superintendent exerts no great influence upon the educational system of the state, but occupies rather the position of a clerical or statistical officer, with merely advisory powers. There would seem to be a need in many states for an increase of his powers and a strengthening of the powers which he already possesses.

### State Supervision of Local Schools

Local autonomy in school matters is still the prevailing condition, and, under proper restrictions, is desirable in order to strengthen the interest of the people in their schools. But when carried too far, the evils of local control outweigh any

possible advantages. Such undue local control cannot be effectively overcome through the creation of the usual formal legal interrelations between the state superintendent and the county superintendents, such as the transmission of statistical information and the taking of appeals in cases involving the interpretation of the school laws. Effective state control is more easily exercised where there exists an administrative relation between the state superintendent and the county superintendents. Some tendencies in this direction are noticeable in some states.

An important means of extending and strengthening state control over the local management of the school system is through the policy of state financial aid. This method of state control has developed hand in hand with the establishment of state central educational authorities. The policy of granting state aid to localities for educational purposes carries with it the implication that the exercise of educational functions by such localities is more than a matter of mere local concern. It also implies that the state should follow the funds thus granted to see that they are properly and efficiently expended, and this means the entering wedge of state control. In most states the support of public schools still comes largely from local taxes, but the proportion of the total expenditure contributed by the states is steadily increasing.

State financial aid may be in the form of income from a permanent fund or endowment or may be appropriated out of the proceeds of current taxes. It may be distributed regularly among the localities on a specified basis of apportionment, or it may be granted on condition of the adoption and maintenance of certain specified educational standards. The first method aims to equalize conditions among the localities and to assist them in performing necessary educational activities; the second undertakes to supply a definite incentive to stimulate the localities to supply still better educational facilities.

A corollary which naturally flows from the policy of the states in establishing free public schools is the enactment by the states of compulsory attendance laws. Since it costs little more to maintain schools with full attendance than with poor attendance, economy of expense per unit of educational result

is enhanced in proportion to the degree of attendance. These laws vary considerably in the ages of required attendance, the annual term of required attendance, the exceptions allowed under the rules, and the methods of enforcement. In most instances the states have been content with a legislative declaration in favor of compulsory education, without making adequate administrative provision for the enforcement of the laws.

### State Educational Institutions

Many states have established higher institutions of learning, such as state universities and agricultural and mechanical colleges. These institutions, found mostly in the Central and Western States, have, through the munificent support given to them by their respective states, begun to rank side by side with the older privately endowed institutions of the East. In the large majority of cases the managing boards of trustees of state universities are appointed by the governor with the consent of the senate, but in a few, including Illinois and Michigan, they are elected by popular vote. In most cases there are a few *ex officio* members. In some states, the boards of trustees of the state universities have also other state educational institutions under their management and control. State universities have been and are a potent influence in building up the standard of education throughout the state. Specifically, they have promoted higher standards in secondary schools through their high school visitors or inspectors, and through placing on their accredited lists only those schools which comply with certain minimum educational requirements.

In some states, the higher educational institutions are under separate boards and located in different places. This is frequently true as to normal schools and also sometimes as to the state university or college of liberal arts and the agricultural and mechanical or technical college. This situation is likely to produce waste, duplication of equipment and work, and competition among the institutions for students and appropriations. Where expensive equipment has been built up in separate places, it is usually impracticable to bring the higher institutions together in one place. Greater coöperation between the insti-

tutions, however, may usually be effected. The question has usually been whether to continue the separate boards or to consolidate the institutions under the control of a single board.

The Consolidation Commission of Oregon found in 1918 that the state university, the state agricultural college, and the state normal school were under separate boards and located in separate places. The report of the commission, as formulated by its expert, recommended that what was called the "three-in-one plan" should be introduced as a compromise, whereby there should be a state board of education of nine members, to be composed of three institutional committees of three members each, one committee for each of the three institutions. These committees were to appoint the presidents and faculties of their respective institutions and to attend to local and special matters, while the three committees together, composing the whole state board of education, were to attend to matters affecting more than one of the institutions, such as formulating requests for any appropriations needed above the proceeds of the millage tax and taking over the functions of the Board of Higher Curricula in eliminating, so far as possible, duplication of work among the several higher educational institutions.<sup>2</sup>

### Administration of Charities and Correction

With the growth of the general population and the increasing complexity of modern social conditions, there has been a steady growth in the size of the dependent and delinquent classes and a growing inadequacy of local or private agencies to deal with the problems to which the care of such classes gives rise. The various state charitable and correctional institutions have been established from time to time for the care of special classes of inmates as the result of a policy of opportunism. As at first developed, these institutions were state institutions in the sense that they were supported almost, if not entirely, by funds from the state treasury, were each managed directly by a separate board of trustees appointed by the governor and senate, and

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<sup>2</sup> J. M. Mathews, in *American Year Book* for 1918, p. 236; quoted by G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration* (1919), p. 160.

usually also received inmates from any part of the state. So far as the control over the institution was concerned, however, the state character of the institution was frequently merely nominal, for local influences were predominant in its management.

The administration of the institutions under separate boards tends to become localized because such boards are not under the effective supervision of any state officer or body of general powers and responsibilities. Central supervision over local charitable and correctional institutions is desirable in order to secure better care and treatment of the inmates, better construction and arrangement of institutional buildings, and the more efficient collection and prompt transmittal of statistical reports. Experience has shown that these objects can seldom be attained under a decentralized system of charitable and correctional administration, and some degree of central supervision and control has therefore been introduced in most states. This first took the form of mere supervision, but where this was not found sufficient, some degree of control was added.

The various state boards may be roughly divided into supervisory boards and boards of control. The supervisory board is the weaker of the two from the standpoint of the extent of centralization, and, as the less radical step in this direction, was usually the first to be taken.

Among the distinguishing characteristics of the supervisory type of state board are that it is superimposed upon the separate boards of trustees of the individual institutions, and that its functions consist principally in making visits, inspections and investigations, giving advice, criticisms, and suggestions to the managing boards and officers of the institutions, making reports and recommendations to the governor and legislature, and keeping the general public informed as far as possible in regard to the existing and more advanced methods of conducting the institutions under its supervision.

### State Boards of Control

The second main type of state board, classified with reference to the extent of its powers, is the state board of control,

or central administrative board. Among the distinguishing characteristics of this type of board are that it is composed of a small number of salaried members, appointed by the governor and senate, who presumably give their whole time to the work, and that it supersedes the separate boards of trustees for the individual institutions and assumes the management and control of all or several of the state institutions. While the supervisory board is an additional wheel in the machinery of state administration, the establishment of the state board of control decreases the number of state agencies dealing with charitable and correctional matters. Under the board of control plan, each institution ceases to be virtually a small kingdom in itself, without effective connection with other institutions or with the state government, and becomes a unit in the consolidated, centralized system of management and control through the state board. Its administrative powers include general control of practically every element of the administration of the various institutions subject to its power. Among the most important of these elements of administration over which the board has control are the appointment and removal of the superintendents of the various institutions, the fixation of the salaries of all employees of the institutions, and the purchase of the necessary supplies.

### The Dual System

The question as to the relative merits of the state board of control and the state supervisory board was formerly much debated. It is not necessary for us now to weigh the conflicting arguments and make a decision between them. Conditions in the several states are so different that it cannot be inferred that a system which works well or ill in one state will necessarily do the same in another. Moreover, the character of the men and women who occupy positions on the board is frequently a more important factor than the particular type of board. Furthermore, it is now recognized that there is no necessary incompatibility in the existence of the two types of boards side by side in the same state. It is recognized that in the administration of charities and correction, there is

a financial or business side and a professional or humanitarian side. Business management is best represented by a board of control, while the promotion of advanced, scientific methods of care and treatment of inmates and the advocacy and adoption of broad social measures for the prevention of moral, mental, and physical disease are services which can be best performed by supervisory boards, composed of public-spirited, philanthropic, disinterested men and women, imbued with love for the work and coöperating with competent superintendents.

The realization of these facts has received its concrete manifestation in the introduction of the dual system of simultaneous control and supervision by separate state agencies. Although the two boards in the dual system may be assigned entirely different functions so as to avoid the danger of conflict, nevertheless, this system is somewhat lacking in the elements of simplicity and definiteness of responsibility. Any reorganization of the system should be made in the light of two factors in the situation: first, that the whole system should be directly linked with one of the chief executive departments of the state government, and, secondly, that, other things being equal, a single commissioner is more efficient as an executive than a board, while as an advisory body a board is to be preferred.

### **Public Health Administration**

Until the middle of the nineteenth century, public health administration was largely decentralized. All measures connected with public health administration were carried out by local authorities, either general or special, and at present many important powers and duties of this character are still in the hands of the local authorities. The gradual increase in the powers of the state boards of health has been brought about in part by the supervision of the state boards over the performance by local authorities of the duties imposed upon them. Thus with regard to the abatement of nuisances of a local character, the local authorities are usually competent to act, subject to the supervision of the state board. Indirect administration by the state board may, however, develop into direct, as where,

if the local authority fails to act or performs its duties in a negligent manner, the state board may step in and carry out directly measures for the promotion of the public health. On the other hand, where the function is one which local authorities are not competent to perform, the state board may act directly in the first place, without waiting for local action.

The bulk of the powers of state departments of health are of an executive or administrative character. They embrace most of the important special measures taken for the promotion of the public health, such as the establishment of quarantine, the abatement of nuisances and the inspection of public buildings and other places liable to breed disease. The powers and duties of state health departments may be classified in accordance with the nature of the power exercised or the character of the objects affected by such exercise rather than with the method of its exercise. From this standpoint, the powers and duties of the state health authorities may be classed as relating to: (1) the collection and dissemination of information on public health matters, (2) the examination and licensing of certain classes of practitioners, and (3) taking measures directly for the prevention or eradication of disease.

Since the successful application of sanitary measures depends in large degree upon the coöperation of the mass of the people, the education of the people in health matters should be one of the essential objects of the activity of state departments of health. Some of the more advanced states issue bulletins of a popular character and endeavor to distribute them among the people as widely as the funds at their disposal may permit.

The functions of examining and licensing frequently involve the exercise of other powers, such as that of setting up standards of instruction and reputability for schools and colleges which undertake to prepare persons for entrance into the professions. Furthermore, the power to examine and license sometimes carries with it the function of regulating the practice of the profession in question.

In order to control communicable diseases, action must be taken both to prevent their introduction from outside and to



eradicate disease breeding conditions within. To secure the first of these objects the most usual measure is the establishment of quarantine. The power of establishing quarantine was at first freely exercised by local units within a state against each other, but the abuses which arose from this practice have brought about an increasing degree of state control, either through direct administration by state officers, or through effective state supervision over local quarantine authorities.

The second method of controlling communicable diseases, *viz.*: through the suppression of insanitary conditions within the state, has now become the more important of the two and now requires the greater part of the energy of state health departments. Among the measures taken with this object in view are the abatement of nuisances, the inspection of food, drugs, milk and water supplies, and supervision of sanitary conditions in hotels, tenements, lodging houses, slaughterhouses, and other places liable to breed disease. Here, also, many of these measures were formerly left for the most part to be attended to, if at all, by the local authorities, but an increasing degree of state control is manifest. Some of these functions, such as the control of milk and water supplies, are of such a character that local authorities do not have sufficient jurisdiction to exercise them adequately, and, in such cases, the tendency towards state control is even more evident. Many local communities in most parts of the country are still quite backward in matters of public health. The local health officer is frequently a practicing physician who gives only a small part of his time to strictly public health matters. The increase of central supervision has generally resulted in increased efficiency of public health administration, and has redounded to the advantage both of the localities and of the state as a whole.

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## CHAPTER XV

### THE ENFORCEMENT OF STATE LAW<sup>1</sup>

THE efficiency of law enforcement in the states is influenced by many factors, such as the character of the law, the nature of the conditions upon which the law is designed to operate, and the working of the machinery provided for its enforcement. The more nearly the laws express the opinion of the mass of the people, the more likely they are to receive that support of public opinion which is almost essential to their enforcement. If the population is fairly homeogeneous, both the demands of public opinion for the enactment of laws and the support of such opinion in their enforcement is, other things being equal, more definite and certain than when the population exhibits a large degree of heterogeneity in race, color, and literacy.

#### The Machinery of Law Enforcement

The efficiency of law enforcement in the state is also influenced by the character of the machinery provided for such enforcement. Some dependence is placed upon private initiative to effect this purpose. Thus, suits may be brought by taxpayers to prevent illegal disbursement of public funds, while, under the Injunction and Abatement Law of Iowa and other states, any citizen may apply to the proper court for an injunction against the maintenance of a building for an illegal purpose.

For the most part, however, dependence for law enforcement must, of course, be had upon the regularly constituted officers and authorities established for that purpose, such as the governor, the courts, the militia, state and local commissioners and inspectors, the attorney-general, the states attorneys, sheriffs, mayors, constables, and police. These various

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<sup>1</sup> For fuller discussion of the subject matter of this chapter, see the author's *Principles of American State Administration*, Chaps. XV and XVI.

officers do not constitute a unified department of justice for the state but merely a group of officers and agencies more or less independent of each other, between whom conflicts, friction, and lack of coöperation may and sometimes do arise. Thus, the enforcement of state laws is not infrequently impeded through the issuance of temporary injunctions by the courts. On the other hand, the courts may assist in the enforcement of law through exercising control over administrative officers by the issuance of mandamus and other writs, or by the removal of delinquent officers. They also assist in the same function through the imposition of penalties upon both official and private violators of law.

Conflicts may arise with respect to the enforcement of anti-liquor or anti-vice laws between the law-enforcing officers of a county and of a city located within the county, as well as between state and local officers. It is not usually wise to intrust the same functions to be exercised by separate and independent officials in the same territory. The result of such a provision may sometimes be that responsibility is divided, and an opportunity is afforded whereby local officials may engage in the unedifying pastime of "passing the buck" in an attempt to shift responsibility for lawless conditions.

### The State Department of Justice

Although, as already pointed out, there is no unified state department of justice, there is at least nominally such a department in practically all the states, of which the attorney-general is the titular head.<sup>2</sup> He, together with the local prosecuting

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<sup>2</sup> Louisiana, by its constitution of 1921, provided for a state department of justice, headed by the attorney-general, while Wyoming, in the same year, created a state department of law enforcement. Idaho, by the administration consolidation act of 1919, had already created such a department with power "to enforce all the penal and regulatory laws of the state in the same manner, and with like authority as the sheriffs of counties." It was also given numerous special powers, such as the supervision of the registration and licensing of automobiles, dealers, and chauffeurs and all the powers vested by law in the state fish and game warden, his deputies and assistants. Such a department of law enforcement with large powers is needed in many other states. It should have an efficient body of state police under it for the work of

attorneys, upon whom the law imposes the duty, under certain circumstances, of instituting prosecutions for the violation of state law, may, perhaps, be called the state department of justice. It is much more loosely knit and disintegrated, however, than the corresponding department of the National Government.

In more than forty states the attorney-general is now chosen at large by popular vote. In the other states he is chosen either by the governor alone, or by the governor with the consent of the senate or council, or by joint ballot of the two branches of the legislature. There is no prevailing length of tenure for the attorney-general, the term varying from one to four years, but the tendency is towards the longer period. In several instances the term of the attorney-general does not coincide with that of the governor.

In addition to removal by impeachment, provision is made in a few states for the removal of the attorney-general by special process. In no case can he be ousted from office except for cause and after having received notice of the charges against him and an opportunity of defense.

The attorney-general receives a fixed annual salary from the state, which is tending to increase. In a number of states, particularly those in which his salary is small, he is allowed various fees in addition. The generally recognized ill effects of the fee system, however, have caused a decided tendency towards the adoption of the provision, either in the constitution or by statute, that all fees collected by the attorney-general shall be turned by him into the state treasury. Since the legislatures have not, as a rule, undertaken to enumerate all his powers and duties, the attorney-general still derives some powers from the common law;<sup>3</sup> but most of them now depend upon constitutional or legislative enactment. These powers and duties may be classified as follows:<sup>4</sup>

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suppressing crime and promoting the general welfare, particularly in rural districts.

<sup>3</sup> *State v. Ehrlick*, 65 W. Va. 700. In *Fergus v. Russel*, 270 Ill. 304, it was held that the common law powers which the attorney-general possesses under the constitution are inherent in the office, and cannot be taken away by the legislature.

<sup>4</sup> *Report of Attorney-General of Pennsylvania*, 1913-1914, pp. 3ff.



*Forensic.* He appears in the Federal or state courts in all cases in which the state is a party or interested, for the prosecution of offenders against state law and to defend actions brought against state officials in their official capacity.<sup>5</sup> Under certain limitations, he may enter a *nolle prosequi* for lack of evidence or other cause, and thereby discontinue the proceedings. It is particularly his duty to bring actions for the enforcement of state law in those cases where the interests of the public in general are injuriously affected, but where no one individual is sufficiently interested to have standing in court. In the exercise of his discretionary power, he may fail to bring such action, or, if brought, he may fail to prosecute it vigorously or, at certain stages of the proceedings, may abandon the prosecution altogether.<sup>6</sup> The large discretionary power thus placed in his hands is thus liable to subject him to great pressure either to deal leniently with powerful lawbreakers, or to curry favor by bringing unwarranted prosecutions against unpopular defendants.

*Advisory.* It is his duty, when requested, to render opinions to the governor, heads of departments, and state boards upon legal questions arising in connection with their official duties. Contrary to the practice in the Federal Government, the state attorney-general is also required to give opinions upon such questions to either branch of the legislature, and, in some states, to legislative committees. In particular, he consults with and advises the local prosecuting attorneys in matters relating to their official duties. The opinions of the attorney-general are, of course, not mandatory, and it has been usually held by the courts that a state officer who acts upon what proves to be a mistaken opinion of the attorney-general does so at his own peril.

*Quasi-judicial,* such as the passing upon applications for suggestions to the courts that certain extraordinary writs be issued, as, for example, that a writ of *quo warranto* be issued to test the title of a person holding public office.<sup>7</sup> The attor-

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<sup>5</sup> Cf. *State v. Village Council of Osakis*, 128 N. W. 295.

<sup>6</sup> *People v. Spring Lake Drainage and Levee District*, 253 Ill. 479.

<sup>7</sup> *Report of Attorney-General of New York*, 1906, pp. 18ff.

ney-general may hold hearings upon the question in which both sides are represented and his decision in the matter is sometimes final.

*Miscellaneous*, such as serving upon various state boards, among the most usual being the state board of pardons.

State boards and commissions have not infrequently been authorized to employ special counsel to conduct their legal proceedings. With the growth of such boards in number and variety of function, the legal business of the state has tended to become disintegrated, and conflicts or friction frequently arose between the attorney-general and the special counsel of state boards and between the different special counsel.<sup>8</sup> Even where no actual conflict arose, the lack of coöperation between the various officers intrusted with the state's legal business operated to defeat the ends of harmony and economy.<sup>9</sup> On the other hand, the frequent failure of local prosecuting attorneys to coöperate with state boards by prosecuting violations of the substantive law which the board is created to enforce has a tendency to cause such boards to rely principally upon special attorneys to prosecute such violations. Moreover, in the case of boards and commissions whose activities involve a large amount of litigation, the employment of special attorneys for the purpose is almost necessary. Such special attorneys, however, need not be entirely disconnected from the legal department of the state government. They should be appointed by the attorney-general, attached to his office and subject to his supervision, though under the immediate direction of the particular boards to which they are assigned. Within recent years, some states have provided by constitutional or statutory enactment that all the law business of the state shall be conducted by the attorney-general or under his direction.<sup>10</sup> It results, therefore, that as new activities

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<sup>8</sup> Cf. *Report of Attorney-General of New York*, 1907, p. 8.

<sup>9</sup> *Report of Attorney-General of Massachusetts*, 1897, p. xvi; *Report of Attorney-General of Illinois*, 1907-1908, p. ix.

<sup>10</sup> In *Fergus v. Russell*, 270 Ill. 304, it was held that "except where the constitution or a constitutional statute may provide otherwise, the attorney-general is the sole official adviser of the executive officers and of all boards, commissions and departments of the state government,"

are undertaken by the states and new boards and commissions created, the work and importance of the attorney-general's department increase correspondingly.

It still remains true, however, that the legal business of the state is largely disintegrated. This arises not only from the existence of numerous special attorneys for state boards, but also from the lack of central control over the local officers, usually called district attorneys, prosecuting attorneys, or state's attorneys, to whom is largely intrusted the conduct of the state's legal business in the localities. In the large majority of states, this officer is elected by the people of the county or other local district into which the state may be divided for this purpose. His term of office is usually either two or four years. In no case can he be ousted from office until certain formalities of a judicial or quasi-judicial character have been complied with. In some states the attorney-general may institute *quo warranto* proceedings against him in the supreme court of the state. Perhaps the most summary methods of removal exist in New York and Minnesota, where the governor alone may remove him after notice of the charges against him and opportunity of defense. This power of the governor is executive and not judicial, and his decision is not reviewable by the courts.

The prosecuting attorney appears for the state and county and prosecutes all actions, civil and criminal, in the courts of his county, in which the state or county is a party or interested. He also gives his opinion to any officer of the county upon legal questions relating to the duties of his office. He attends the grand jury for the purpose of giving them legal advice, examining witnesses, and drawing up indictments. His power of entering a *nolle prosequi* in a criminal case has, in a number of states, been considerably curtailed.

Various somewhat half-hearted attempts are made to bring the prosecuting attorneys under central control. It is frequently provided that they shall be under the direction of the attorney-general, who may exercise supervision over them as

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and, consequently, an appropriation to the state insurance superintendent for the legal services of special counsel is unconstitutional and void.

to the manner of discharging their duties, and it is made their duty to assist him in the prosecution of important cases arising in their localities. There is usually, however, no means provided for enforcing this power of direction, and friction and differences of opinion have frequently arisen over such a question as to whether sufficient evidence exists for undertaking a particular prosecution. Under such circumstances, even though the attorney-general might require the prosecuting attorney to begin the prosecution or, when directed by the governor, take charge of the law business in the local courts, he would still be handicapped by lack of coöperation on the part of the local attorneys. A partial remedy for this condition of affairs has been found in some states, either by the removal of the local attorney, or by a practical supersession of the local prosecuting officers by officers of central appointment and control.

### Law Enforcement and Home Rule

Dependence in the first instance for the enforcement of state law rests upon local officers, sheriffs, constables, states attorneys, mayors, and police. Direct action by state authorities takes place ordinarily only when local authorities fail or are unable to cope with the existing lawlessness. In legal theory, sheriffs, states attorneys, and police are state officers;<sup>11</sup> but, for practical purposes, they bear more nearly the character of local officers, because they are, for the most part, subject to local control only. Under these circumstances, such officers are naturally influenced in enforcing state law by public sentiment in their respective localities; and if such sentiment is very strongly opposed to a particular state law, that law is not likely to be very strictly enforced. Thus the system of depending upon local officers for the enforcement of state law may bring about a species of extra-legal home rule in the localities. The exercise by localities within the state of the dispensing power may result in the practically open defiance of state law. The jury system has operated as an effective barrier to prevent the

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<sup>11</sup> *City of Chicago v. Wright*, 69 *Illinois*, 318 (326).

enforcement of a state law in a community to the majority of whose people the law is obnoxious.

Whatever justification there may be, however, for the exercise by the localities of the power to suspend laws with respect to purely local matters, there is no justification for the exercise of this power with respect to laws the enforcement of which is of concern to the whole state. It may not always be easy to draw a sharp line between purely local matters and those of state-wide concern, but about many matters there can be little doubt. Thus, the whole state is interested in the prevention or suppression of crimes against the public health and in the bringing to justice of persons guilty of infamous crimes.

To sum up, the nullification of state law in the localities is rendered possible by the system whereby the state depends for the enforcement of its law upon local officers who are elected by the people of the locality and are subject to no effective state control. Under this system the state law is not likely to be strictly enforced or perhaps not at all, unless enforcement is favored by the public sentiment of the community which controls the agents of enforcement. A system of centralized enactment of law combined with decentralized enforcement must, almost of necessity, fail to secure a uniform enforcement of the law throughout the state, because the law as enacted reflects, at least theoretically, the common standard represented by the average opinion of the whole state, while its enforcement is subjected to the varying standards represented by the varying local sentiment in different sections of the state.

Two main difficulties stand in the way of reaching a correct solution of the problem of state law enforcement in the localities. In the first place, under existing state legislation, there is a conflict between the will of the state as embodied in such legislation and the will of the locality in regard to the expediency of such legislation as applied to itself. Unfortunately, it frequently happens that the state undertakes to regulate by law matters in regard to which uniformity of policy is not essential to the well-being of the state, but which are in reality primarily local matters. Under these circumstances a proper consideration for the interests and sentiments of the localities would re-

quire the transfer to them of power to regulate such matters to suit themselves. For the solution of this difficulty, therefore, a broader legislative power should be granted to the localities than they now possess, somewhat similar to that which they enjoy in countries of Continental Europe, while state legislation should be confined to the regulation of matters which are of state-wide concern, or in which state-wide uniformity of policy is essential to efficiency of administration.

The second main difficulty, which stands in the way of reaching a correct solution of the problem of state law enforcement in the localities, lies in the fact that the officers who are charged with the duty of enforcing state laws are frequently charged at the same time with the performance of purely local functions and through the method of local election are for the most part subject only to the control of the localities. Under these circumstances, such officers play a dual rôle and owe a double allegiance, and if they usually act as though their primary allegiance in case of conflict is to the locality at whose behest they hold their offices and fail to enforce a state law to which local sentiment is hostile, such a result is only a natural consequence of the position in which such officers are placed.

With respect to state laws the enforcement of which in certain localities is opposed by a considerable element of the population therein, the state might adopt one of three possible courses: first, repeal the laws by formal legislative action, or secondly, allow the localities, in a regular and legal manner, the option as to whether or not such laws shall be enforced within their boundaries, or, thirdly, retain the laws upon the statute books, but provide adequate machinery for their enforcement.<sup>12</sup> The old saying, attributed to General Grant, that the way to secure the repeal of an obnoxious law is to enforce it rigidly does not apply to a situation where a law is obnoxious to some localities only, but the power of repeal cannot be exercised except by the authority of the entire state. On the other hand, formal repeal of such laws is seldom seriously

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<sup>12</sup> Mathews, "Law Enforcement and Home Rule," *Proceedings of the Third Annual Convention of the Illinois Municipal League*, pp. 43-54.

considered as a practical measure, partly because this would constitute a tacit admission of the state's inability to enforce them with the existing machinery, and partly because such action would be distasteful to the large numbers of people who still desire to retain such laws on the statute books as a matter of principle.

The second possible course of action with regard to the enforcement of state laws, that of local option, represents an effort to adjust such laws to the sentiments and wishes of the majority of particular localities. In practice local option does not, of course, imply that certain state laws may be suspended in particular localities (though the result is practically the same), but that the law as applied to certain political subdivisions may be altered by a vote of the people of such subdivision.

### **State Control of Law Enforcement**

Local sentiment does not readily tolerate complete state centralization of law enforcement in the localities. It seems evident, however, that for the regular and permanent enforcement of state law, some state machinery of enforcement is needed in addition to the power of the governor to call out the state militia. If the state is in earnest in the enforcement of its laws, it is practically necessary in many cases that the state should definitely assume the responsibility for such enforcement by providing some special machinery to that end, preferably of an extra-local or state character. Although efficiency in the enforcement of state law is impeded by the prevalent system of administrative decentralization and dependence on local authorities, nevertheless there are some indications of increasing state control or supervision over the enforcement of state law. To some extent, such supervisory power over law enforcement has been vested in the governor. The enforcement of the police laws of the state belongs primarily to the local officers elected for that purpose, but if such officers are derelict or impeded in the performance of their duties, the occasion may arise for action on the part of the governor.

The constitution imposes upon the governor the duty of

taking care that the laws are faithfully executed, but he is vested with comparatively little control over the officers upon whom he must largely depend for the execution of the laws. The governor, however, as the most conspicuous officer in the state, can occasionally accomplish something in the direction of law enforcement through the publicity which attaches to his words and actions. Whatever control the governor may exercise over the enforcement of law through the force of publicity is largely an extra-legal power, and the extent to which it may become an effective instrument depends to a considerable degree on the personal qualities of the governor.

### The State Militia

The authority of the governor in securing the enforcement of the laws rests, in last resort, upon his constitutional position as commander-in-chief of the state militia. The character of the state militia indicates in some degree the extent to which it may be used in law enforcement. Since it is composed for the most part of men whose regular work lies in other fields, it is not suitable for utilization as a permanent body for ordinary law enforcement. In practice, the militia is utilized as a law-enforcing agency only on extraordinary occasions, such as where the local authorities are unable to cope with the lawless element in the community. From the experience which we have had with the use of the militia in enforcing state law, some inferences may be drawn as to the effectiveness of this instrument in accomplishing the object in view. The militia may be useful as a reserve force to be used on extraordinary occasions, but for the ordinary enforcement of law it is not available. "To call out the militia," as Governor Shafroth said, "to close a saloon on Sunday would be one of the most ridiculous things in the world."<sup>18</sup> It would be as though one used a trip hammer to break an eggshell. Such ordinary enforcement of law requires a regular permanent police force. It is needless to say that the state militia does not answer this description. Furthermore, on account of the length of time that it takes the militia

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<sup>18</sup> *Governors' Conference Proceedings, 1910, p. 217.*



to reach the scene of trouble after being called out, they are not usually available to prevent an outbreak of lawlessness, but only to suppress it after it has happened. But in the meantime, much property may be destroyed and lives endangered by the lawless element. After being called out, they cannot be kept on the scene indefinitely, but must in time be withdrawn, and it has been the frequent experience that outbreaks of lawlessness at once recurred upon the withdrawal of the troops. Again, the use of this instrument for the enforcement of state law is not only cumbrous but also expensive.

Experience has shown, however, that there might be some advantages in retaining the militia as a reserve force to be used in the national defense and creating an additional agency of a more permanent, regular, and professional character to assist, supervise, or displace local authorities in the enforcement of state laws. Attempts have been made to secure better law enforcement either by the creation of a state constabulary primarily for the purpose of enforcing state law in the rural districts, or by the establishment of state supervision of metropolitan police forces.

In the cities, the feeling in favor of the maintenance of the principle of home rule is probably stronger than in the rural districts; and moreover the cities are usually better policed by their local constabularies than are the rural districts. The principle of home rule requires that the city police should be appointed, officered, and governed by local authorities. To the extent that the functions of the city police consist in the enforcement of local ordinances, there is no demand that the principle of home rule should be infringed. But city police are also charged with the enforcement of state laws. The latter functions might be transferred to state controlled agents if experience shows that the locally controlled police cannot be depended upon to perform them, or else the city police might be placed under state supervision. The state might set up a standard of efficiency for municipal police forces and exact a penalty from those cities whose forces fall below that standard, while granting aid to those whose forces meet or surpass such standard.

### The State Police

Since the close of the World War, there has been a considerable increase of crime all over the country, and this situation renders it desirable if not imperative that the states should adopt more efficient machinery for law enforcement. This need is further accentuated by the adoption of the prohibition amendment to the Constitution of the United States, authorizing enforcement legislation by the states concurrently with that of Congress. A few states, in which the responsibility for state enforcement of state law is more keenly realized than in others, or in which peculiar local conditions conducing to lawlessness exist, have established state police forces.<sup>14</sup> The failure or inability of local authorities in the rural districts to enforce the law in their jurisdictions has been the primary reason for the establishment of the state police. If it be argued that the state constabulary system encourages local law-enforcing officials to permit their organizations for crime detection to become atrophied through reliance on the state police, the answer is that in many rural districts they are already in this condition.

In view of the services rendered by the state police, its value can scarcely be doubted. Its principal function has been to act as a continuous rural police for the apprehension of the perpetrators of ordinary crimes, for which the use of the state militia would be entirely impracticable. In Pennsylvania the state troopers have also assisted in extinguishing forest fires, have made many arrests for the violation of the game laws, and have frequently assisted the health officers in maintaining quarantine during an epidemic of some contagious disease and in preventing the pollution of streams. They have confiscated supplies of opium and dynamite and have raided gambling resorts, disorderly houses, and places where liquor was being illegally sold. They have afforded protection from fire, flood and other troubles to localities which have no adequate police force and are too far removed from large centers of population to obtain quick aid in case of necessity. The cost of main-

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<sup>14</sup> For an outline of the movement for state police forces, see M. Conover, in *American Political Science Review*, February, 1921, pp. 82-93.

tenance of the state police, moreover, is small in comparison with the benefits. The mere additional security afforded to the residents of the state is amply sufficient to counterbalance this expenditure, but to such additional security should be added the additional amounts of fines, forfeitures and confiscations which accrue to the state, the prevention of property losses by fire, theft, and violence, and the increase in property values which results from the greater security arising from the existence and activities of the state police. There is also a great saving to the state due to the fact that the existence of the state police frequently renders it unnecessary for the state to undergo the expense of calling out the state militia.

Although a state police force might be utilized to a considerable extent in connection with the newer phases and enlarged sphere of state activities, nevertheless the work of such a force will doubtless continue in large measure to consist of the performance of conventional police functions. However, although the repressive activities of the state are still of fundamental importance, the work of the state is becoming more and more developmental in character. Repressive and developmental functions, however, cannot be wholly separated, for in the performance of its developmental functions, the state frequently finds it necessary to take repressive measures.

As a general rule, each of the numerous boards, commissions and bureaus found in the various states is charged with the enforcement, or with the supervision of the enforcement, of some portion of the substantive law of the state. The members of the state department thus become a special state police force for the enforcement of the particular portion of the substantive law of the state intrusted to their charge. In a number of states, special state enforcement machinery has been created for the purpose of enforcing the state prohibition statute passed under the concurrent power of the state to enforce the Eighteenth Amendment to the Constitution of the United States.

In order to safeguard private rights from encroachment through arbitrary administrative action, it has usually been deemed necessary that any such action should be subject to judicial review. The promotion of the social welfare, how-

ever, often requires a considerable scope of administrative action. We find, therefore, that even where final court action may be necessary, the enforcement of state law may be secured to a considerable extent through preliminary actions of administrative authorities. Thus, though convictions may be had and penalties imposed only by the courts, nevertheless the enforcement of state law is promoted by the more efficient machinery for the detection of its violation which the state administrative agency affords, and violations may be prevented through the fear of detection inspired by the existence of such machinery.

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## CHAPTER XVI

### THE ORGANIZATION OF THE STATE COURTS

THE settlement of controversies between individuals and the punishment of crimes or antisocial acts constitutes one of the most important functions of the state. The importance of this function has increased with the growth of population, the multiplication of laws, and the increasing complexity of modern social and industrial conditions. For performing this function, the states have established specialized agencies known as courts. Although power of a quasi-judicial nature may be exercised to some extent by the legislative, executive, or administrative organs of the state government, judicial powers, properly speaking, are vested in the main in such judicial tribunals as are provided for by the constitution or created by law. Courts may be defined as tribunals established by the state for the administration of justice according to law. They are among the most important agencies used by the state for the enforcement of law. State courts are usually provided for by the constitution and this has the effect of so crystallizing the judicial organization as to make it difficult to secure such changes as may be needed to meet new conditions. On the other hand, it renders the courts somewhat more free from needless legislative tinkering.

#### Historical Development of State Courts

The judiciary of the American states has developed from that set up in the colonies, which in turn followed the model of the English system, in so far as it was applicable to American conditions. Above the local justices of the peace were usually found the county courts, composed of the justices of the county, and having limited jurisdiction in civil and criminal cases. The court of general jurisdiction was the superior or supreme court, which was, in some colonies, composed of a distinct body of

judges, appointed by the governor, but was often composed of the governor himself, with his council or assistants. A striking characteristic of the colonial and early state judiciary was the considerable extent to which judicial functions were exercised by executive and legislative bodies. Thus, equitable jurisdiction in the colonies, though sometimes exercised by a chancellor, appointed for this special purpose, was more often exercised either by the legislative assembly or by the governor. Judges of the colonial courts were usually appointed by the governor alone, or by the governor and council, and held office during life and good behavior, but in some colonies they might be, and occasionally were, arbitrarily removed by the governor.

Revisory and controlling authority over the colonial judiciary rested with the judicial committee of the Privy Council, which might reverse the decisions of the highest colonial courts. This extra-colonial control over the judiciary was, of course, destroyed when the colonies threw off their allegiance to the mother country and, beginning in 1776, undertook to draw up constitutions for the establishment of separate state governments. In these first state constitutions the colonial judicial system was, in the main, retained. It became necessary, however, to provide some substitute for the appellate jurisdiction hitherto exercised over the colonial courts by King and Council. Courts of last resort were therefore set up in New York and Maryland, but in most of the other states no distinct court was at first provided for this purpose, but appellate powers were vested either in the legislature or in the governor and council. The disregard of the principle of the separation of powers and the dominating position granted, during the Revolutionary period, to the legislature over the other departments of government are illustrated both in the judicial power thus actually vested in that body and also in its control over the selection of state judges. In seven of the original thirteen states,<sup>1</sup> the selection of judges was entirely in the hands of the legislature, while in two other states<sup>2</sup> the legislature par-

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<sup>1</sup> Connecticut, Rhode Island, New Jersey, Virginia, North Carolina, South Carolina and Georgia.

<sup>2</sup> Pennsylvania and Delaware.

ticipated with the executive in the choice. In Massachusetts, New Hampshire and Maryland judges were appointed by the governor and council, and in New York by a special "Council of Appointment," composed of one senator from each senatorial district.

In most of the original states, the tenure of the judges of the highest court was at first during good behavior or until the attainment of the age limit, usually seventy years. In Pennsylvania and New Jersey, however, they served for a seven year term, but were reëligible, while Georgia, in her Constitution of 1798, prescribed the extremely short term of three years. In nearly all the states, judges were removable by impeachment in the ordinary way. In Maryland they could be removed only for misbehavior on conviction in a court of law, while in Massachusetts and New Hampshire they might be removed by the governor, with the consent of the council, upon the address of the two houses. In many states the legislature could also remove the judges.

The first state constitutions left much power in the legislature over the judiciary, in addition to that of the selection and removal of judges. Only the main outlines of judicial organization were provided for in the constitution, and large discretion was therefore conferred upon the legislature in prescribing by statute the details of organization and jurisdiction. In some of the constitutions there was nothing to prevent the abolition of existing courts by the legislatures, or the absorption of numerous judicial functions by the latter. The amount of the salaries of the judges were, in all states except South Carolina, left to the discretion of the legislature, and, even when once fixed, there was at first in some states no constitutional prohibition upon the increase or decrease of the amount by the legislature during the term of the judge. This power of the legislature might thus be, and occasionally was, used as a means either of bribery or of intimidation of the judges.

During the first half of the nineteenth century, a number of significant changes took place affecting the position of the state judiciary. The example set by Georgia in abandoning



the principle of judicial tenure during good behavior and prescribing a short term of office was followed by a number of new states upon their admittance into the Union or subsequently, and was also adopted by some of the older states. Thus Ohio, in 1802, adopted a seven years term of judicial office, and New York, in 1846, embodied the same principle in her organic law. The tendency, during this period, to reduce the tenure of judges to a comparatively short fixed term was perhaps partly due to the influence of several instances in which judges holding for life had, during their later years, become evidently unfit for judicial office, but is doubtless also to be attributed in large measure to the influence of the democratic wave which swept over the country during this period and brought in its wake the doctrine of quick rotation in elective offices, which was applied by analogy to judicial offices, even when not elective.

This democratic wave is also responsible for the introduction of the system of choosing judges by popular vote. This important and radical innovation is said to have been first suggested by Jefferson. It was employed by Georgia and Indiana as early as 1812 and 1816 respectively for the choice of judges of certain inferior courts. Mississippi was the first state to give the experiment a full trial when, in her Constitution of 1832, she provided for the election of all judges by the people for short terms. During the fifteen years from 1845 to 1860 no less than twenty-three states, located in various sections of the country, adopted the system of an elective judiciary, either in whole or in part. This served to make it the distinctive American system, which has since been steadily extended, and but seldom departed from, after it has once been introduced. During the latter half of the last century the tendency was noticeable in several quarters to increase the length of the judicial term. In 1869 New York lengthened the term of judges of the higher courts from eight to fourteen years and four years later Pennsylvania increased that of her supreme court judges from fifteen to twenty-one years. This lead has since been followed by a number of other states. The tendency thus indicated to lengthen the judicial term has

doubtless helped to counteract in part some of the demoralizing effects of popular election.

### Organization of the State Courts

Each state is possessed of judicial powers which are completely independent and self-sufficient, except in so far as they are limited by Federal law. In the exercise of these broad and undefined powers, each state has established a hierarchy of judicial tribunals. Provision for this purpose, as already noted, is now usually made in the Constitution, thus placing the courts upon a more stable basis than if left to legislative creation. Thus the power of the legislature in establishing courts is strictly limited. That body does not possess sufficient discretion in the formation of courts to supply the needed flexibility in judicial organization required to meet changing conditions, especially in metropolitan areas.

At the bottom of the scale stand local courts of inferior and limited jurisdiction, such as the justices of the peace, the municipal courts, and the county courts. The court of the justice of the peace, found nearly everywhere, is one of inferior jurisdiction and is not a court of record. It can pass on petty civil and criminal cases, and appeals may generally be taken to a higher court. Justices of the peace are usually elected from townships or small districts, but in a few states are appointed by the governor. There are usually several of them in each township or district, and their jurisdiction ordinarily extends throughout the county. The attorney for the plaintiff selects the justice before whom the case shall be tried. This is a favor to the justice selected, since he is paid, as a rule, only by the fees collected from the business brought before him. There is a natural tendency for the justice to return the favor by deciding cases in favor of the plaintiff. Or, if it is a criminal case, there is a strong temptation to convict the prisoner in order to secure the fee incidental to such conviction.

Justices of the peace also issue warrants of arrest, hold preliminary hearings in felony cases, and, if the evidence is sufficient, bind over the prisoner to await the action of the grand jury. Justices are not usually trained lawyers, and so

many abuses have grown up in connection with their work that, in some localities, they have been put upon a salary basis, while, in some cities, such as Chicago, they have been abolished and unified municipal courts established in their places. Such courts generally have a broader jurisdiction than that previously exercised by the justices of the peace. Some of them, as in Chicago, have a chief justice who exercises important powers of supervision over the associate judges and over the work of the court generally. Other special courts have been established in a number of cities, such as juvenile courts, courts of domestic relations, and night courts.

Most of the states have county courts, which are at least nominally judicial bodies, exercising civil and criminal jurisdiction in certain cases. They hear appeals from justices of the peace and municipal police courts, but the majority of the cases in the county courts originate therein. In some states, however, they have little or no judicial power, but are primarily administrative bodies for the management of county affairs, such as those relating to roads and bridges, jails, and the care of paupers. They also sometimes have certain powers of appointment. In some states the county court also acts as a court of probate for the proving of wills and the administration of estates. Other states have established special probate courts, sometimes called orphans' courts or surrogates' courts, while sometimes, as in Illinois, the county court is a probate court in the smaller counties, but in the more populous counties special probate courts are found.

Next above these inferior courts stands a court, known variously as the circuit, superior, or district court, which is usually presided over by a single judge, who holds court successively at different places in his circuit or district. This circuit or district ordinarily embraces more than a single county. Its boundaries are determined by the legislature, subject sometimes to the proviso that it must be composed of compact territory and contiguous counties, and that, in changing the boundaries the legislature shall not thereby affect the tenure of office of any judge.

The circuit court, as it may be generically called, is the prin-

cial trial court of the state, in which most cases of any importance are litigated. This is the court to which indictments by the grand jury are usually presented and in many cases a practically final determination of questions of fact are made by the verdicts of petit juries returned to this court. Leaving aside specific differences, it may be said to have general original jurisdiction of the widest character in all cases, both civil and criminal, irrespective of the amount of money involved or of the degree of the offense. In a few states, however, the original jurisdiction of the circuit court is limited to cases involving less than a given amount or to such as are enumerated by law. This court also, in general, hears appeals from the inferior courts. In the furtherance of the exercise of its jurisdiction, the court is authorized, in a number of states, to issue certain original and remedial writs. In the large majority of states the circuit judges are elected by the voters of their judicial circuits. In a very few, however, they are appointed by the governor, with the consent of the senate. In two states they hold office during good behavior, but in the others they hold for a term varying from four to fifteen years, the average being six years. The practice formerly prevalent whereby circuit courts were left without special judges, but were held by members of the supreme court, has now been generally abandoned. Entirely aside from the fact that the supreme court judges are now usually too busy for circuit court work, the former practice was objectionable because cases decided in the circuit court might later come before the supreme court for adjudication.

### State Supreme Courts

At the apex of the hierarchy of state courts stands one appellate court of last resort. This highest court is in about forty states known as the supreme court. In the others it is variously known as the court of appeals, court of errors, or the court of errors and appeals. In two of these latter states there is below the highest court another tribunal called the supreme court. A few states, whose highest court is the supreme court, interpose courts of appeals between the supreme court and the

## STATE JUDICIARY

STATE	HIGHEST STATE COURT				OTHER COURTS				
	Name of Court	No. of Judges	Length of Term (years)	How Chosen	Name	No. of Dist.	No. of Judges	Term (yrs.)	How Chosen
Maine .....	Supreme Court	8	7	Gov. and Council	Nisi Prius Superior Courts in 2 counties	.....	.....	.....	.....
New Hampshire..	Supreme Court	5	(a)	Gov. and Council	Superior Court	10	2	7	Gov. and Coun.
Vermont .....	Supreme Court	5	2	Legislature	County Courts	14	5	(a)	Gov. and Coun.
Massachusetts ...	Supreme Court	7	(b)	Gov. and Council	Superior Court	.....	6	(b)	Legislature
Rhode Island ....	Supreme Court	5	(c)	Legislature	Superior Court	.....	28	(c)	Gov. and Coun.
Connecticut .....	Court of Errors	5	8	Gov. and Legis- lature	District Courts Superior Court Court of Com. Pleas in 5 counties	12 8 5	7 13 11 8	3 3 4	Legislature Legislature Gov. and Legis. Gov. and Legis.
New York .....	Court of Appeals	7	14	Elected	Appellate Division Supreme Court County Courts	4 9 .....	25 107 .....	..... 14 6	Elected Elected Gov. and Sen.
New Jersey .....	Court of Errors and Appeals	16	7	Gov. and Senate	Chancery Supreme Court Circuit Court County Courts Superior Court Court of Com. Pleas Chancellor	..... 9 6 ..... 5 .....	9 9 6 ..... 7 .....	7 7 7 10 ..... 12	Gov. and Sen. Gov. and Sen. Gov. and Sen. Elected Gov. and Sen.
Pennsylvania .....	Supreme Court	7	21	Elected	Circuit Courts	.....	.....	.....	.....
Delaware .....	Supreme Court	6	12	Gov. and Senate	Special Courts, in Balt.	8	22	15	Elected
Maryland .....	Court of Appeals	8	15	Elected by Dis- tricts	Circuit Courts	.....	.....	.....	.....
Virginia .....	Supreme Court of Appeals	5	12	Legislature	Circuit Courts	31	31	8	Legislature
West Virginia ...	Supreme Court of Appeals	5	12	Elected	Circuit Courts	23	24	8	Elected

## STATE JUDICIARY—(Continued)

STATE	HIGHEST STATE COURT				OTHER COURTS				
	Name of Court	No. of Judges	Length of Term (years)	How Chosen	Name	No. of Distrs.	No. of Judges	Term (yrs.)	How Chosen
North Carolina ..	Supreme Court	5	8	Elected	Superior Court	20	20	8	Elected
South Carolina ..	Supreme Court	5	10	Legislature	Circuit Courts	14	14	8	Legislature
Georgia .....	Supreme Court	6	6	Elected	Court of Appeals	3	6	6	Elected
Florida .....	Supreme Court	5	6	Elected	Superior Court	33	31	4	Elected
					Circuit Courts	13	14	4	Gov. and Sen.
					County Courts	.....	.....	.....	.....
Kentucky .....	Court of Appeals	7	8	Elected by Dis-	Circuit Courts	35	43	6	Elected
Tennessee .....	Supreme Court	5	8	tricks	Court of Civil Appeals	23	5	8	Elected
				Elected	Chancery Court	14	14	8	Elected
					Circuit Courts	8	18	8	Elected
Alabama .....	Supreme Court	7	6	Elected	Criminal Court	5	5	6	Elected
Mississippi .....	Supreme Court	6	8	Elected	Chancery Courts	16	16	6	Elected
Arkansas .....	Supreme Court	5	8	Elected	Circuit Courts	.....	.....	4	Gov. and Sen.
Louisiana .....	Supreme Court	5	12	Elected	Chancery Courts	13	.....	4	Gov. and Sen.
Texas .....	Supreme Court	3	6	Elected	Circuit Courts	4	21	6	Elected
Oklahoma .....	Supreme Court	9	6	Elected	District Courts of Appeals	30	9	8	Elected
					Court of Criminal Appeal	.....	32	4	Elected
					Courts of Civil Appeals	9	27	6	Elected
					District Courts	.....	.....	4	Elected
					Criminal Court of Appeals	3	3	6	Elected
					District Courts	27	33	4	Elected
Ohio .....	Supreme Court	7	6	Elected	Courts of Appeal	9	27	6	Elected
Indiana .....	Supreme Court	5	6	Elected	Courts of Common Pleas	.....	.....	6	Elected
					Appellate Courts	2	6	4	Elected
					Circuit Courts	68	68	6	Elected
					Superior Courts in 10 cos.	.....	14	4	Elected

## STATE JUDICIARY—(Continued)

STATE	HIGHEST STATE COURT				OTHER COURTS			
	Name of Court	No. of Judges	Length of Term (years)	How Chosen	Name	No. of Dist.	No. of Judges	Term (yrs.)
Illinois .....	Supreme Court	7	9	Elected	Courts of Appeal	4	15	6
Michigan .....	Supreme Court	8	8	Elected	County Courts	18	65	Elected
Wisconsin .....	Supreme Court	7	10	Elected	Circuit Courts	102	102	Elected
Minnesota .....	Supreme Court	5	6	Elected	Circuit Courts	20	49	Elected
Iowa .....	Supreme Court	7	6	Elected	District Courts	20	25	Elected
Missouri .....	Supreme Court	7	10	Elected	District Courts	19	46	Elected
Kansas .....	Supreme Court	7	6	Elected	District Courts	21	64	Elected
Nevada .....	Supreme Court	7	6	Elected	Courts of Appeal	3	64	Elected
Nebraska .....	Supreme Court	7	6	Elected	Circuit Courts	38	65	Elected
North Dakota .....	Supreme Court	5	6	Elected	District Courts	34	38	Elected
South Dakota .....	Supreme Court	5	10	Elected	District Courts	18	32	Elected
Montana .....	Supreme Court	3	6	Elected	Circuit Courts	12	13	Elected
Idaho .....	Supreme Court	3	6	Elected	District Courts	12	12	Elected
Wyoming .....	Supreme Court	3	8	Elected	District Courts	18	27	Elected
Colorado .....	Supreme Court	7	10	Elected	District Courts	9	12	Elected
New Mexico .....	Supreme Court	3	8	Elected	District Courts	7	7	Elected
Arizona .....	Supreme Court	3	6	Elected	District Courts	13	22	Elected
Utah .....	Supreme Court	3	6	Elected	County Courts	8	8	Elected
Nevada .....	Supreme Court	3	6	Elected	Superior Courts	14	14	Elected
California .....	Supreme Court	7	12	Elected	District Courts	7	12	Elected
Oregon .....	Supreme Court	7	6	Elected	District Courts	10	10	Elected
Washington .....	Supreme Court	9	8	Elected	Courts of Appeal	3	9	Elected
					Superior Courts	58	103	Elected
					Circuit Courts	20	25	Elected
					Superior Courts	39	59	Elected

(a) Until 70 years of age. (b) During good behavior. (c) Until removed by the legislature.

circuit courts. In addition to the regular courts, provision is also made in a number of states for the creation of certain special courts, such as courts of claims and courts of conciliation. In a few states there are also separate chancery courts.

A state cannot be sued without its consent, but the state may establish a court in which claims against it may be brought. Such a court is not usually a court in the proper sense of the word, but is rather a commission to advise the legislature as to what claims should be paid. An appropriation by the legislature must be made before this can be done.

The supreme court, as the highest court of the state may be generically called, is invariably organized upon the collegial principle. There is usually an odd number of judges, varying from three to sixteen. In thirty-eight states, the judges of the supreme court are now elected by popular suffrage. In the other states they are appointed either by the legislature<sup>3</sup> or by the governor, with the consent of the senate, council, or legislature.<sup>4</sup> In those states where the elective method is employed, the judges are usually chosen by the voters of the state at large, but in a few states they are elected by districts. Provision is usually made whereby they shall not all be elected simultaneously, but may be gradually renewed. Among the various qualifications prescribed for judges in different states may be mentioned those requiring that they shall be "learned in the law," and shall have been practicing attorneys and residents of the state for a given length of time. In some states, such as Indiana, the judges of the supreme court are also required to be residents of the respective judicial districts into which the state is divided, even when elected by the voters of the state at large. Among disqualifications are the holding of any other office of trust or profit under the state or Federal Government. They may also be disqualified to preside in the trial of a particular case by reason of pecuniary interest in its outcome or by consanguinity with either of the parties.

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<sup>3</sup> Vermont, Rhode Island, Virginia and South Carolina.

<sup>4</sup> Maine, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware.



One of the justices of the supreme court serves as the chief justice. It is sometimes provided that the justice having the shortest unexpired term and not filling a vacancy shall be the chief justice. It is aimed in this way to secure a fairly quick rotation in the office. The selection is also sometimes made by the voters, by the governor with the consent of the senate, or by the justices themselves. The chief justice usually distributes the cases to the different justices for the preparation of opinions. These are usually assigned to the different justices in rotation, without regard to their subject matter, so that each justice, except possibly the chief justice, has approximately an equal number of opinions to write. The opinion prepared by the particular justice is mimeographed or printed and circulated among the other justices who make criticisms and corrections. Theoretically at least, the opinion in its final form is the opinion of the court, yet frequently it is actually a mere one-man opinion, since the justice writing the opinion is naturally as a rule more familiar with the case, and the other justices are often inclined to rely largely on his judgment as to the reasoning of the opinion.<sup>6</sup>

It is not necessary that all of the judges of the supreme court should hear every case argued, but a majority of them constituting a quorum, is usually competent to sit. In some states, as in New York, Ohio, Missouri, Washington, and California, provision is made whereby the court may sit in separate coördinate divisions. The jurisdiction of the two divisions may be concurrent, or, as in Missouri, one division may have exclusive cognizance of criminal cases. In Ohio, cases involving the constitutionality of an act, and those in which the judges of one division fail to agree as to the judgment to be rendered must be referred to the whole court for adjudication. This device is designed to facilitate the disposal of cases, but unless the work of the divisions is carefully coördinated, there is a possibility that it may make the law uncertain through inconsistency in the line of decisions rendered.

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<sup>6</sup> Cf. O. N. Carter, "Methods of Work in Courts of Review," *Illinois Law Review*, November, 1917, pp. 231-259.

The state supreme court, as well as the other state courts of record, is supplied with a clerk and other necessary subordinate officers. These are sometimes appointed by the court, but the clerk is frequently elected by popular vote. The county clerk is usually *ex officio* clerk of the county court. Since clerks are merely ministerial officers, there appears to be no logical reason why they should not be appointed by the court to which they are attached. Such judicial appointments do not violate the principle of separation of powers. In fact, the principle of the independence of the judiciary requires that the courts should control the selection of all officials whose assistance is essential to the proper performance of judicial functions. A clerk elected by popular vote is under neither popular nor administrative control.

On account of the large number of appeals which are constantly being brought up to state supreme courts, many of them are overburdened with work and are sometimes far behind in the disposal of cases. Attempts are made to meet this situation in various ways. In the first place, intermediate appellate courts are created in some states, with final jurisdiction in not unimportant cases. In the second place, as we have seen, the supreme court may be organized in two coördinate divisions, which has the effect of almost doubling its ability to dispose of cases. In the third place, commissioners are sometimes appointed by the court or by the governor to prepare opinions which must of course be approved by the court. Masters are frequently used, especially in equity cases, to attend to matters of detail. Finally, the number of judges on the court may be increased. If each justice of the supreme court were furnished with competent clerical assistance in making investigation of the law relating to particular cases, independently of the briefs filed by attorneys, it might not only facilitate the disposal of cases but also improve the character of the opinions rendered. Too many undigested precedents are often cited in the course of opinions handed down by many of the courts, and it would probably lighten the burden of both the bench and the bar if opinions were generally reduced in length.

The organization of the bar has an important influence upon

the character of the bench. Broad and statesmanlike views presented by the bar in arguments before a court are likely to be reflected in its opinions. Lawyers are officers of the courts in which they have been admitted to practice, and are subject to punishment by the court for misconduct, even, in extreme cases, to the extent of disbarment. The qualifications for admission to the bar vary widely from state to state, but the courts may regulate such admission in the absence of constitutional or statutory provision on the subject. The younger members of the bar are frequently assigned by the courts in particular cases to act as counsel for impecunious clients who are parties to such cases, and the acceptance of such assignment is obligatory. Such unpaid service, however, is not always likely to be very efficient, and, in some localities, regular public defenders are provided for this purpose. Lawyers may frequently prevent useless litigation by proper advice to their clients.

### Jurisdiction of the State Courts

The jurisdiction of the supreme court embraces the whole state and is to a large extent appellate in character, though original jurisdiction is sometimes exercised in special cases, particularly in the issuance of original prerogative writs, such as *mandamus*, *quo warranto*, *habeas corpus*, injunction, *certiorari*, *procedendo*, etc. The cases in which the supreme court may exercise appellate jurisdiction are in some states enumerated in the constitution, but in others left to be defined by statute. In spite of variations, it may be said in general that the supreme court hears appeals from the lower courts in all cases of whatever kind, except those involving small amounts of money or in which the offense is of minor character. Intermediate appellate courts, however, sometimes have final jurisdiction in certain classes of cases which are not unimportant. Where there is a court of appeals above the supreme court, it has only appellate jurisdiction. Cases are brought up from the lower courts to the highest state court by way of appeal or upon writ of error, and the decision of the latter court is final except in cases where a Federal right is involved

or the validity of a Federal statute is contested, which may be carried to the Supreme Court of the United States.<sup>9</sup> That court is the final arbiter of questions as to the boundary between Federal and state power, but within these limits the supreme courts of the various states may differ in their interpretation of the scope of state power. In deciding cases brought before them, state courts apply the law that bears upon the case, whether it be state or Federal law. The judges of the state supreme court are bound by the provisions of the Federal Constitution, as well as by those of the state constitution, but, until recently, if a state supreme court decided that an attempted exercise of state power was void as in violation of the Federal Constitution or laws, its decision was final. By amendments to the Federal judicial code adopted in 1914 and 1916, however, cases may be certified to the Federal supreme court for final decision whenever a Federal question is involved, without regard to whether the decision of the state court was favorable or unfavorable to the Federal right set up. By this arrangement greater uniformity is secured in the interpretation of Federal constitutional limitations.

In a few states separate courts of equity held by a chancellor are still maintained, and equitable relief may be sought in such courts. In other states the same court hears causes both in law and in equity, but keeps them in separate dockets. In the majority of states, however, the distinction between law and equity has for practical purposes been abolished and the two classes of cases may be merged and both legal and equitable remedies obtained in the same suit.

The vast majority of suits and actions brought in the United States are litigated in the state courts. Some cases may be brought in either the state or Federal courts. The state supreme court is the final authority for determining the meaning of the state constitution and laws, and if a Federal court, through the diverse citizenship of the parties, takes jurisdic-

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<sup>9</sup> Cases where a Federal question is involved may be carried to the Federal supreme court not only from the supreme court of a state, but from any state court which is the highest court having jurisdiction of the case.

tion of a case in which it must apply the state constitution or laws, it follows, with certain exceptions that need not here be noted, the decisions of the state supreme court as to their meaning.

The decisions of the various courts of the state are to some extent integrated and unified through the process of appeals from the lower to the higher courts. In addition to this means whereby the higher courts may exercise control over the lower courts, it is expressly provided by the constitutions of about a dozen states that the supreme court may exercise supervisory control over inferior courts, and in three other states<sup>7</sup> the supreme court may remove from office judges of lower courts. The supreme court, however, does not have adequate power to direct the work of the other courts nor does it usually have power to lay down rules for their guidance.

In several states, trial courts are directed by the constitution to report to the supreme court any defects which they may discover in the laws, and such information is then transmitted to the legislature for consideration. This provision would enable the courts to assume an advisory initiative in matters of legislation, but it is a power which appears to have been but little used.

### The Selection of Judges

Originally, state judges were appointive in accordance with the custom in the colonies and in England. The appointing power was sometimes the legislature, sometimes the governor. But, as we have seen, as the result of the democratic wave which swept over the country during the first half of the nineteenth century, appointment gave way to popular election in most states, combined with tenure for comparatively short terms of office. This movement was not directed especially at judges, but was merely a corollary or incidental result of the general trend towards the forms of popular control over the political departments of the government. The essential difference in the function of judges from that of political departments of the

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<sup>7</sup> New York, Indiana, Texas.

government, and the effect which this difference should make upon the method of selecting judges, was lost sight of. However well the plan may have worked in primitive and sparsely populated communities, it has failed to work in accordance with its theory under modern conditions in large cities and populous states. The result has been one phase of the breakdown generally in the plan of the long ballot, regardless of the nature of the offices to be filled by popular election.

As a basis for reforming defects in the existing methods of selecting judges, it is necessary at the outset that there should be a clear understanding of the actual methods now practiced, as distinguished from the legal forms that are followed. Although the people go through the form of electing judges in most states, there is and can be in the great majority of cases no actual selection by the voters as a mass. The long ballot has placed such a heavy burden upon the voter that he has very largely abdicated the function which he was supposed to perform and has left the real selection of most of the elective officers to the party managers. The conditions were such that the average voter could not perform fully and intelligently the functions which the elective system required of him. Judges, as well as other officers, remained nominally elective by the people, but were in reality appointed by the political experts who controlled the nomination of candidates and drew up the party slate. Where judges are elected at the same time as national, state, and local officers, a sitting judge might fail of reelection, not because of any popular dissatisfaction with his record, but because of an upheaval in national politics. To some extent this defect has been perceived and an attempt made to remedy it by providing for the election of the more important judges at times separate from the election of national and state political officers. Even in this case, however, the ignorance of the mass of the voters as to the qualifications of the various candidates usually renders them incompetent to make a real selection. Moreover, the relative unimportance of this election as compared with the joint election of governor, legislature, and President, tends to decrease the interest of the voters in, and attendance at, separate judicial elections to such

an extent that the party organizations have usually experienced little difficulty in controlling them.

It appears, therefore, that, in any event, whether the form of popular election is followed or not, the actual method of selecting judges must be that of appointment. Judges are or should be experts, and experts cannot be chosen satisfactorily except by appointment. It is sometimes argued that judges should be popularly elected because they exercise political powers in declaring legislative acts unconstitutional, and pass on social legislation in accordance with their own views of public policy. In answer to this argument, it may be said that, in the first place, the exercise of political powers is a comparatively small part of the ordinary duties of a judge. In the second place, a candidate for judicial office cannot properly seek votes on the basis of his attitude toward general questions of social and public policy. It is his duty to confine himself, if elected, to the application of the law to such cases as may be brought before him. In the third place, even if popular selection were desirable, no actual popular selection is possible under the present methods of conducting popular elections. In the fourth place, the popular responsibility of judges may be sufficiently enforced by providing for the possibility of their retirement by popular vote after appointment by competent authority.

Since the method of selecting judges must, in any event, be that of appointment, the only question is, by whom shall the appointment be made? In a half-dozen states the judges are appointed by the governor, subject to confirmation by the legislature, by the governor's council, or by the senate. In a few others they are appointed by the legislature. The latter plan of appointment is objectionable in that it may be made as the result of logrolling methods. It practically amounts to appointment by the legislative caucus of the majority party. Yet the legislature usually contains a considerable percentage of lawyers who are competent to select good judges. At any rate, this method seems, on the whole, to be superior to that of popular election. It is inferior, however, to that of appointment by the governor, for, even though his action is subject to confirmation,

there is likely to be more concentrated responsibility for the choice made. In some of the states in which appointments are made by the governor, such as Massachusetts and New Jersey, the judiciary is superior to that in most of the states following the method of popular election, in respect to the character of the judges, the liberality of their views on social questions, and the efficiency with which justice is administered.

In many of the states following the form of popular election, the condition of the judiciary has become admittedly so unsatisfactory that a movement has grown in recent years to bring about reform in the method of choosing judges. This movement has taken two directions: first, toward retaining but improving the operation of the method of popular election, and, secondly, toward discarding the form of popular election in favor of appointment by legal prescription. In states where, on account of political inertia and the apathetic state of public opinion, the abandonment of the form of popular election is impracticable, some improvement may still be brought about. Since, as we have seen, the real selection cannot be made at the formal election, such improvement must be brought about by reforming the method of nominating candidates for judicial office.

Formerly, it was customary to nominate candidates for the various offices in party nominating conventions, lists of candidates being submitted to the convention by the party boss or leader of the party organization and usually adopted by the delegates as a matter of course. This was not a wholly objectionable method, since the party leaders knew something as to the qualifications of the candidates. Under this method, however, the qualification that more usually won the nomination was service to the party rather than competence to fill the judicial office with ability and integrity. Moreover, the party leaders were frequently under little or no sense of responsibility in choosing candidates. In order to remedy these abuses and to secure popular control of the nomination of judges, direct primary elections were introduced, but this plan has not usually been successful in accomplishing the purpose in view. As a matter of fact, both under the old convention system and under the system of nominating judges in party primaries, the real



control over the selection of candidates for judicial office has usually remained in the hands of the party leaders. Thus the judges have often been dependent for their nomination and election as well as for renomination and reelection at the end of their terms upon the will of those who control the organizations of the major political parties.

In order to reduce the influence of the party organizations in nominating and electing judges, three proposals have been made and, to some extent, adopted in practice. The first proposal is for a non-partisan judicial primary, no party designations appearing on the ballot, and would-be candidates securing a place on the primary ballot by filing petitions. In practice, however, this device does not eliminate the influence of the party organization, which quietly passes around the word to party workers as to the candidates to vote for, while the independent vote is likely to be divided among several candidates. The average voter, knowing little or nothing about the real qualifications of the candidates, and deprived of the guide of the party label, is likely to vote for the most blatant self-advertiser among the candidates. If the best man is chosen, it is the result of an accident rather than of reasoned judgment.

The second proposal is that members of the bar, through their associations, be privileged to recommend the selection of certain nominees for judicial positions. This might take the form of a legal provision that the names of the designees of the bar association shall be printed on the primary ballot, with language apprising the voter of such designation, along with the names of any other possible candidates. The governor might also be allowed to designate candidates in a similar way, with the option of endorsing those designated by the bar association. The influence of the bar association, however, has heretofore been exerted in a more informal way. At the approach of judicial elections, the bar association has canvassed its members and attempted to agree upon the candidates whom the association will support. In some cities the influence of the local bar association is so great that its designees are frequently accepted by both of the major party organizations without question. In Wisconsin, when a vacancy occurs in judicial office, which,

under the law, is to be filled by the governor, it has been customary for the state association to hold a bar primary, and the governor usually appoints in accordance with the result of the primary. The appointee is then usually reelected at the expiration of his term. Selection of judges by the bar has many advantages, since the members of the bar are better acquainted than any other group of people with the qualifications of the available candidates, and are directly interested in securing an able and efficient judiciary. On the other hand, selection by such a body as a bar association is somewhat lacking in the element of concentration of responsibility.

Any attempt to improve the method of selecting judges while retaining the form of popular election is not likely to secure the best results. Since in any case most of the judges must be selected by appointment, such appointment should be formally recognized in the law instead of being concealed behind the form of popular election, and the power of appointment should be transferred from the present more or less irresponsible holders of that power to some officer who can be held responsible by the people for the character of the appointments which he makes.

This proposal is not so radical as it may at first seem. Appointment is the method followed in several of the older states, and in the case of United States judges and of those of most of the civilized countries of the world. Moreover, as we have seen, appointment is the actual method in spite of the form of popular election. For carrying out this proposal, two alternative plans are available: first, appointment by the governor, and, secondly, appointment by an elective chief justice. We have had more experience with the first plan and it has worked well in the states which follow it, but, on the whole, appointment by an elective chief justice seems preferable for the following reasons. A chief justice would be more familiar with the qualifications of the members of the bar available for appointment to the bench. He would be less likely to be influenced by political considerations in making appointments, and they would not be subject to confirmation by a political body. While the making of judicial appointments is a comparatively minor part of the

duties of a governor, it would be an important part of the work of a chief justice, and he could be more easily held responsible by the people for the character of his appointments. Moreover, the chief justice would be directly interested in securing able and efficient men to share with him the work of administering justice in the courts of the state.

The elective chief justice should not only appoint the other state judges but should also act as a chief judicial superintendent for the state with power of supervising the work of the other judges and of coördinating the different parts of the state judicial system. A chief justice vested with such large powers could not be appointed by the politicians with the same ease with which they now frequently appoint inferior judges, for the election of such a chief justice would be sufficiently important to attract the attention and to arouse the intelligent interest of the mass of the voters. The possible danger that the large powers vested in him might be abused could be guarded against by making him elective by popular vote for a comparatively short term of office and by subjecting him to the possibility of recall by popular vote during his term. Such possibility of recall, however, should be allowed only at stated annual or biennial intervals and the percentage of voters required to sign the recall petition should be sufficiently high so as to prevent the invocation of the power of recall for trivial reasons and so as to prevent the manipulation of recall elections by politicians in their own interest. Furthermore, in order to retain some direct popular control over the judges appointed by the chief justice, it might be provided that, at the end of the first term of each such appointed judge, the question should be submitted to popular vote as to whether he should be retained for another term. If the question is decided in the negative, the chief justice must then appoint another judge in his place.<sup>8</sup>

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<sup>8</sup> Kramer, "Constitutional Revision," *Proceedings of the Illinois State Bar Association*, 1915, pp. 364, 365. The plan of giving the chief justice power of appointing other state judges is not entirely without precedent since, in New Jersey, the chancellor appoints the vice-chancellors, and the plan has worked satisfactorily. The plan of an elective chief justice with appointive powers also has the support of the American Judicature Society.

### Tenure, Compensation, and Removal of Judges

The almost universal rule now is that the judges of the supreme court hold office for a term of years. In only three states<sup>9</sup> do they still hold during good behavior or until the attainment of the age limit. In all the others the term ranges from two years in Vermont to 21 years in Pennsylvania. The average length of the term is eight years. Vacancies occurring in the office of judges of the supreme court, as well as in those of judges of inferior courts, are, in the majority of states, filled through appointment by the governor and the appointee holds until his successor is chosen at the next regular election. In a few states, if the unexpired term exceeds a given time, a special election is held to fill the vacancy.

The legal provisions as to the terms of judges do not give an accurate indication of the actual length of service of particular judges, since the frequency with which judges are reappointed or reelected varies from state to state. In some states having short terms, a tradition has been built up in favor of retaining sitting judges in office during good behavior. Thus, in Vermont, in spite of the ridiculously short term legally, judges who have given satisfactory service are almost invariably reelected by the legislature, so that for practical purposes it may be said that they hold office during good behavior. One reason why judges are not more frequently reelected in other states is that the election does not turn squarely upon the record of the incumbent. National and state political issues enter to confuse the situation, and the election is further complicated by the concurrent candidacies of those who are attempting to displace the sitting judge. If the question presented to the voter were solely whether the incumbent should be retained, reelections would probably more frequently occur.

The compensation of judges is sometimes provided for in the constitution, but more usually left to legislative discretion, subject to the limitation that the compensation of no judge shall be changed during his term of office. The chief justice usually

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<sup>9</sup> Massachusetts, Rhode Island, New Hampshire.

receives a few hundred dollars more than his colleagues. An expense allowance is often provided, but judges are usually forbidden to accept any fees outside of their salaries. Their compensation is, as a rule, considerably less than the amount which a lawyer of fair ability could make in private practice, and this is probably one cause contributing to the mediocrity of the bench. In some states candidates for judicial office are expected to contribute handsomely to the party campaign fund, and, if elected, their salaries are practically reduced on account of the necessity of paying party assessments in return for their nomination and election at the hands of the party organization.

Various methods are provided for the removal of judges prior to the expiration of their terms. The judges of the supreme court, as well as those of inferior courts, are generally removable by impeachment, carried out in the usual manner by the two branches of the legislature. This method, however, has been but seldom resorted to. In impeachment proceedings, as has been well observed, "it is an unpleasant task to assume the initiative. Those who best know the facts are the lawyers and if some of them are the ones to move, it is at the risk, should they fail, of having afterwards to conduct causes in a court presided over by one who is not likely to regard them with a friendly eye."<sup>10</sup> In about twenty states, judges may also be removed by concurrent resolution of the legislature, or by the governor upon the address of the legislature, but usually only when the vote is larger than a bare majority and after due notice and opportunity of defense. Judges have sometimes been removed from office through the abolition of the court by the legislature, but, on account of the tendency to define the organization of the judiciary in the constitution, this is not now often possible.

A movement, due in part to the dissatisfaction of many people with the unfriendly attitude of state judges toward the exercise of the police power of the state in the passage of social and industrial legislation, has led to the introduction, in the

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<sup>10</sup> Baldwin, *American Judiciary*, p. 340.

constitutions of some states of provisions for the recall of judges by popular vote.<sup>11</sup> It is argued that since, under existing conditions, the judges have, through the methods adopted to secure and retain office, become engaged in politics and have undertaken to exercise political power through declaring unconstitutional laws passed in pursuance of the police power of the state, they should not be allowed to exercise such political power without being subject at the same time to coextensive political responsibility. This new method for the recall of judges may be said to differ from that already practiced in other states where judges are elected by popular vote for a term of years only in the fact that under the new method the recall may take place at any time after the judge has served for six months, while under the older or more usual method, it can take place only at the end of his term when he stands for reelection. Where the terms are short the two methods do not seem to be greatly dissimilar in effect, and, in any case, they differ only in degree and not in kind. Theoretically, popular recall appears to strike a blow at the independence of the judiciary, but, irrespective of the recall, judges have too frequently not been independent. Under the system of popular election of judges, in which nominations are often controlled by party managers, the judges have not seldom been dependent upon the favor of such managers both for original election and for reelection. It may be doubted whether recall elections under the new method will not be equally subject to the manipulation of the party manager. The movement for the recall of judges seems, therefore, to be aimed at remedying a symptom rather than the cause of the difficulty.

Only a few instances of the actual recall of judges have occurred, and these have usually been brought about as the result of charges of corrupt or improper conduct on the part of inferior judges or police magistrates. The people, as a rule, are not much interested in purely legal decisions, and the recall has not been used to retire judges on account of their illiberal or

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<sup>11</sup> These states are Oregon, California, Arizona, Colorado, Nevada, Kansas and North Dakota. Four other states having the recall expressly exclude judges from its operation.

unpopular views and decisions on question of public policy.<sup>12</sup>

In this connection, the recall of judicial decisions may be mentioned, because such proposals are oftentimes as symptomatic of political tendencies as are measures actually put into practice. The so-styled recall of judicial decisions is not as radical a departure as its name would seem to indicate. It may be regarded as merely a new method of amending state constitutions by popular vote,<sup>13</sup> so that, when state courts declare acts of the legislature unconstitutional with respect to certain provisions of the state constitution, the people may have the opportunity to amend those provisions of the Constitution by direct vote on the question, so as to render such acts constitutional.<sup>14</sup>

## REFERENCES

For references, see end of next chapter.

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<sup>12</sup> The argument against the recall of judges is well presented by former President Taft in his message to Congress vetoing the enabling act for the admission of Arizona to the Union with a constitution allowing such recall. House doc. 106, Sixty-Second Congress, 1st Session.

<sup>13</sup> Cf. W. D. Lewis, "A New Method of Constitutional Amendment by Popular Vote," *Annals of the American Academy of Political and Social Science*, September, 1912, pp. 311-325. For a strong argument against this device, see A. B. Hall, *Popular Government*, Chap. VIII.

<sup>14</sup> Colorado was the only state which actually adopted the recall of judicial decisions, having inserted in her constitution a provision for this purpose, which went into effect in 1913. It prohibited any court lower than the supreme court from declaring laws unconstitutional. In 1921, however, the provision was held void by the state supreme court as violative of the constitution of the United States in that it unduly limited the power of the courts to decide federal questions. *People v. Western Union Tel. Co.*, 198 Pac. 146. Cf. *People v. Max*, 198 Pac. 150. It may be noted in this connection that the decisions of the supreme court of the United States in the case of *Chisholm v. Georgia*, the *Dred Scott* case, and the income tax case of 1894 were recalled by the eleventh, fourteenth, and sixteenth amendments respectively.

## CHAPTER XVII

### THE WORK OF THE STATE COURTS

COURTS, as already noted, may be defined as tribunals established by the state for the administration of justice according to law. For practical purposes, the law may be defined as consisting of such rules of conduct as are capable of being enforced in the courts.

#### The Development of the Law

Formerly, law was largely a spontaneous growth, developing through customs and prevalent ideas of morality. In modern times, however, law is made largely through conscious enactment. In the American states, the lawmaking authority is the people acting indirectly through constitutional conventions or representative legislatures, or directly through the initiative and referendum. The courts, however, also participate in lawmaking to some extent. Judicial power has been defined as "that power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws."<sup>1</sup> The body which has power to construe the law, however, has incidentally great influence over determining what the law shall be. This is especially true in cases of first impression, where the discretion of the court is not limited through the existence of precedents which may have almost imperative authority in the decision of later cases.

One may be thoroughly familiar with the constitution and statutory or written law of a state and still not know many of the rules of law which are habitually applied and enforced by the courts of the state. For the written law is supplemented by the unwritten or common law. The latter is the body of law developed through the centuries by the decisions of the

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<sup>1</sup> *People v. Chase*, 65 Ill. 527.



English courts and transplanted to the English colonies in America, together with acts of Parliament which were in force in the colonies at the time of their separation from the mother country. The body of common law thus transplanted has been modified to suit the different conditions found in the New World, and has also been molded and developed so as the better to conform to new conditions as they arise in the various states. This modification and development of the common law has been brought about in part by formal legislative enactment and in part by judicial decision and the gradual accretion of precedents. Under the rule of *stare decisis*, the courts must usually follow precedents or previously decided cases involving substantially similar circumstances. Consequently, changes in the common law through judicial development is naturally a slow and tortuous growth. Where decided or quick change is desired, resort must usually be had to legislative action.

Along with the common law, the states inherited also the system of equity jurisprudence as it existed in England. This system arose during the fourteenth century for the purpose of relieving the rigidity of the common law in certain classes of cases. It was administered by the king's chancellor, who dispensed justice on behalf of the king to those litigants who were unable to secure it in the common law courts. At first he rendered decisions according to his own conscience, and it was said that equity as administered from time to time might differ as did the measure of the chancellor's foot, but later precedents in the chancery court became more fixed and are now followed almost to the same extent as in the common law courts.

Equity undertakes to provide more adequate remedies in certain cases than can be secured under the common law, and to enforce new rights not protected by the common law. Thus, for injuries to person or property, the only remedy at common law is a suit for damages. In cases, however, where the injury is likely to be irreparable and, consequently, the recovery of damages is not an adequate remedy, an equity court may issue an injunction forbidding the commission of the injury by any person threatening to do so, under penalty of pronouncing him guilty of contempt of court and summarily punishing him with-

out trial by jury. The distinction between the law and the facts is not so sharply drawn in equity cases as in law cases, and equity courts do not usually employ juries, but the judges of such courts are the judges both of the law and the facts.

Not only was a distinction made between legal and equitable remedies, but these classes of remedies were administered in separate courts. The plan of separate tribunals is due to historical causes and does not rest upon any logical basis. It was later abandoned in England and has now been abandoned in most of the American states. The distinction between legal and equitable remedies still exists in most states, but, in the majority of the states, both classes of remedies are capable of being administered in the same court, according to the nature of the case. A few states have gone further and have undertaken to abolish the distinction between legal and equitable remedies, through the adoption of a plan of code procedure.

### Judicial Procedure

The powers of the courts may be classified into jurisdictional and inherent. The former is the power to hear and decide particular kinds of cases, and is specifically conferred upon the courts by constitution or statute. Jurisdiction may be of different kinds, such as original, appellate, final, concurrent, and exclusive. The inherent powers are those which do not need to be expressly granted but are impliedly possessed by the courts on account of the very fact that they have been established as such. Among the inherent powers of courts are those of preserving order in the court room, of punishing for direct contempt of court, and of enforcing their decisions and decrees. Contempt may be either direct or indirect, and may be either civil or criminal. In contempt cases, as already noted, the proceedings are summary, and the accused has no right to trial by jury, but the court is the judge both of the law and the facts. Final judgment rendered by a court, unless appealed from, is enforced by a writ of execution directed to the sheriff, marshal, bailiff, or other executive officer attached to the court. If resistance is met in executing process, the *posse comitatus* may be called upon, and the whole power of the govern-

ment employed to enforce the judgments and decrees of the court.

The range of inherent judicial power which cannot be abridged by legislative action is not very well defined. It has been held, however, that the legislature cannot curtail the power of the courts to punish for direct contempt, nor compel the judges to give in writing the reasons for a decision, nor to prepare syllabi of their opinions. It has also been held that the legislature cannot impose upon judges duties other than those of a judicial nature. Numerous instances have occurred, however, in which the legislature has imposed upon them functions of a ministerial character.

Courts do not take the initiative in deciding cases, but wait until controversies over which they have jurisdiction are brought before them. As a rule, moreover, courts refuse to pass upon hypothetical or moot cases or to answer questions as to the meaning of constitutional provisions unless it becomes necessary to do so in determining the rights of parties having adverse interests in a *bona fide* case brought before them. In a half-dozen states, however, by constitutional provision, and in one or two others, by statute or custom, the supreme court is required to render an advisory opinion upon questions of law submitted to it by the governor or the legislature. Inasmuch as no actual case involving the matter in question is before the court for decision, the opinion is not ordinarily rendered in the light of opposing arguments, and has not the weight of a precedent.

The opinions rendered by the highest state courts are usually furnished with headnotes by the clerk and published in a series of reports. They form precedents of binding authority upon the lower courts in the same jurisdiction, and, on the principle of *stare decisis*, are generally but not invariably followed by the court rendering the decision. The opinions and decisions of the courts of one state may be cited in the courts of another, but are, of course, not binding. Each state is to every other a foreign jurisdiction, except as limited by the Constitution of the United States, which requires that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

The cases which come before the courts may be divided into two classes : civil and criminal. A civil case arises through an act or omission which results in injury to some particular individual, but not to the public generally or to the state. A remedy in such case may be granted either at common law or equity, according to the circumstances of the case. A criminal case arises through an act or omission which constitutes an offense against the state. A given act may constitute an offense both against the state and also against a particular individual, and, under these circumstances, may give rise to a civil suit for damages and also to a criminal prosecution. In the case of a civil suit, the state furnishes the tribunal but not the counsel; while, in a criminal case, it furnishes not only the tribunal but also the prosecuting officer and sometimes counsel for the defense.

### Procedure in Civil Cases

In the trial of cases at law, both civil and criminal, a jury is usually employed, in state courts of general jurisdiction, for the determination of questions of fact. The judge acts as a sort of moderator at the trial. He passes on questions of the admissibility of evidence. Since jurors were originally for the most part illiterate men, the existence of the jury system has caused the establishment of many technical rules of procedure, such as the inadmissibility of hearsay evidence and the requirement that witnesses must appear in person and testify under oath. The judge instructs the jury as to the law applying to the case, and directs them as to the verdict which they shall return in cases in which the facts are not in dispute. The verdict may be either general, *i.e.*, in favor of one of the parties, or special, *i.e.*, a finding of facts without reference to parties. The verdict must be accepted by the court in order to be effective, and, if it is against the evidence, the judge may set it aside. If the jury awards excessive damages, the judge may either set aside the verdict, or reduce the amount of the damages with the mutual consent of the parties. If the jurors disagree, a new trial is ordered. After the verdict has been rendered and accepted by the judge, the court pronounces judgment.

In the absence of express provision to the contrary, the re-

quirement of a jury trial means a jury of twelve men, and the verdict must be unanimous. Such a requirement has not worked well in many cases and numerous modifying provisions have now been inserted in state constitutions. Thus, it is frequently provided that, in civil cases at law, jury trials may be waived by agreement of the parties to the suit, and the judge then determines both law and fact. Sometimes, such waiver is taken for granted unless a jury trial is expressly demanded. In the trial of cases in equity, the judge also determines both law and fact, and a jury has never been considered necessary, although the judge may employ one if he wishes.

Another modification of the original rule that has taken place is found in provisions reducing the size of the jury. Thus, a number of state constitutions either stipulate that a smaller number than twelve may suffice, or authorize the legislature to make the reduction. Under these laws it is sometimes provided that a jury of six men shall be sufficient to try minor civil cases. Finally, the rule requiring a unanimous verdict in civil cases has been modified by the constitutions of many states. Often it is provided that three-fourths of the jury may render a verdict. An interesting provision is found in Minnesota, where it is stipulated by law that if the jury has deliberated for twelve hours without reaching a unanimous agreement, a verdict may then be rendered by five-sixths of the jury.

### Procedure in Criminal Cases

Although indictment by grand jury or information by the prosecuting attorney may sometimes precede arrest, the latter is often the first step in criminal procedure. Under some circumstances, arrest may be made without a warrant, as where an offense is committed in the presence of a police officer or where he has reasonable ground for suspecting that a felony has been committed. A private citizen also has the right to arrest a person committing an offense in his presence, but he must proceed cautiously, for if he should make a mistake, he may render himself liable to a civil action in damages for false arrest. In the absence of the above circumstances, arrests can be made only upon warrant issued upon affidavit or complaint under oath

of the accuser or other reasonable ground by a police magistrate or other proper officer, and particularly describing the person to be arrested. In states having provisions in their bills of rights similar to those in the fourth amendment to the constitution of the United States, the issuance of general or "John Doe" warrants is probably illegal.

Upon arrest, the accused person is brought before a justice of the peace or police magistrate for preliminary hearing. The question inquired into at such hearing is not that of the guilt of the accused, but whether there is sufficient evidence against him to hold him for further proceedings, and, if so, he is bound over to await the action of the grand jury. That is, he is released on bail to assure his appearance for trial. Under the constitutional bills of rights, the bail demanded must not be excessive. Its amount should be determined in accordance with the financial ability of the prisoner and the seriousness of the offense with which he is charged. If he is charged with a very grave offense, such as a capital offense, bail may be refused. On the other hand, if the offense is petty, he may be released on oral bail or personal recognizance.

Petty misdemeanants may be tried without indictment, but, in most states, the next step in criminal procedure where the accused person is charged with a felony or penitentiary offense, is indictment by the grand jury. In some states, however, the grand jury has been abolished and for it has been substituted the filing of an information by the prosecuting attorney. In still other states, both indictments and informations are used as methods of presenting criminal charges to a court for trial. The grand jury was evolved originally for the purpose of injecting an element of popular control into the administration of justice and of protecting accused persons against arbitrary action or persecution by the government. The number of members of the grand jury varies from seven to twenty-three in different states, and it may always take action by less than a unanimous vote. The sessions of the grand jury are secret. The proceedings are *ex parte*, i.e., it hears only evidence against the accused. With the consent of the grand jury, the prosecuting attorney may appear before it for the purpose of

examining witnesses and of advising it as to the law. In practice the grand jury is very largely dependent on the prosecuting attorney in most localities for the necessary evidence on which to base indictments, and usually brings in true bills only upon his recommendation. In most cases informations or written accusations by the prosecuting attorney are preferable to grand jury action.

The next step in criminal procedure after indictment is arraignment of the prisoner in open court for trial. Under the bills of rights, he is entitled to a speedy and public trial. Unfortunately, courts are sometimes so far behind their dockets that excessive delays take place in the disposal of cases, and the constitutional requirement of a speedy trial is not complied with. On the other hand, consciousness of guilt on the part of the accused may cause him to seek delay and criminal procedure provides so many opportunities for delay that in the end he may go "unwhipped of justice." The requirement of a public trial, however, is not violated, but this requirement does not deprive the judge of the right to exclude immature persons from the court room when the testimony is not fit for them to hear. The place of the trial is the county where the offense is alleged to have been committed, unless a change of venue is granted.

Upon arraignment, the charge against the accused is read in open court, and he is then given the opportunity to plead, and if he refuses to plead, a plea of not guilty is entered for him. Under the constitution, he is entitled to a trial by an impartial jury drawn from the vicinity, and this gives him the right to challenge any prospective juror for cause. He is usually allowed also a certain number of peremptory challenges, without assigned cause. By constitutional provision, he is entitled to benefit of counsel, and to compulsory process for securing witnesses on his behalf. He is further entitled to be confronted with the witnesses for the prosecution. He cannot be compelled to testify against himself, unless there is a statute granting him immunity if he does so, in which case his testimony would not amount to self-incrimination. Legally, he is presumed to be innocent until his guilt is proved beyond a reasonable doubt.

In order to secure a conviction, the verdict of the petit jury of twelve men is usually required to be unanimous, and this is always true in capital cases. In some states, for the trial of less serious offenses, a jury smaller than twelve is allowed, or a verdict by less than a unanimous vote is permitted, but these deviations from the strict rule of a unanimous verdict of twelve men are exceptional.

If the jury brings in a verdict of guilty, the prisoner may usually appeal the case to a higher court, or may sometimes secure a new trial on account of irregularities committed during the first trial. If the jury brings in a verdict of not guilty and he is acquitted, he cannot again be tried for the same offense, as this would violate the constitutional guaranty against double jeopardy. In general, the prisoner is put in jeopardy at the time the trial jury is sworn. If, upon conviction, the prisoner secures a new trial, he waives his immunity against double jeopardy. If he should be tried by a court which did not have jurisdiction of the case, this will not prevent another trial by a court having jurisdiction. The same act may constitute an offense against both the state and the municipality in which it is committed, or the same act may constitute two offenses in the same jurisdiction. If such is the case, the prisoner may be tried severally for each of the two offenses without violating the rule against double jeopardy.

If the prisoner is finally sentenced, he still has the benefit of the constitutional provision that cruel and unusual punishment cannot be inflicted upon him. This would prevent torture, but would permit execution by shooting, electrocution, or lethal gas. Although there are now many more criminal offenses than formerly, punishments are on the whole much less severe for the lesser offenses than they were a century or more ago. The elaborate constitutional safeguards for the accused, therefore, seem now to be rather antiquated and unnecessary.

### Working of the Machinery of Criminal Justice

Administrative action in the enforcement of state law is aimed principally at the prevention of its violation. To some extent, judicial action may have the same aim, as in the issu-



ance of injunctions, binding persons over to keep the peace, and imposing penalties on some persons in the hope of deterring others from committing the same offense. In criminal matters, however, the function of the courts is primarily retrospective in character. They are principally concerned in the determination of guilt and in the imposition of punishment after the offense has been committed. The exercise of this function by the courts becomes necessary when the preventive measures of administrative authorities fail in keeping the law inviolate. Where additional coercion is necessary in order to secure the enforcement of the law, the courts may be resorted to. For the final enforcement and carrying into effect of most laws where opposition is encountered, court action is usually contemplated. This practice is due in large measure to the prevalent idea that conclusiveness of administrative action would introduce an arbitrary element into the government, and that, even if efficiency should thereby be sacrificed to some extent, judicial review is desirable in order that individual rights may be adequately safeguarded. The courts thus become virtually a part of the administrative machinery for the enforcement of state law, and the degree of efficiency attained by the courts in the performance of their functions thus becomes, from the administrative standpoint, an important question. No matter how efficient the police may be in making arrests, nor how efficient the administrative officers of the state may be in the performance of the preliminary law-enforcing functions vested in them, if the courts are inefficient or if courts and juries fail to convict in the face of overwhelming evidence, the law will in many cases not be enforced.

While few would go so far as to agree with the wag who paraphrased the definition of a court as a place where justice is dispensed with, it is undeniable that the judicial tribunals of the country, and especially of the states, have of late years been subjected to serious criticism. Thus Governor Noel of Mississippi has declared that "it has been said that laws are made 'to restrain the bad and protect the good.' Even a casual review of the hundreds of criminal convictions in this state reversed for technicalities absolutely foreign to the question

of guilt or innocence, creates in many the belief that 'laws are made to protect the bad and restrain the good.'"<sup>2</sup> Although there is a tendency to base wholesale denunciations of the courts upon the magnified importance of exceptional cases where justice has miscarried, it is nevertheless true that justice as actually administered in the state courts is not an adequate expression of the popular will. Many of the technicalities of procedure, such as in the drawing of indictments, seem to be based upon an exaggerated notion of the importance of individual rights in comparison with the general welfare and security of society. The safeguards for individual rights are amplified by such antiquated constitutional provisions as that which grants immunity to a prisoner from giving testimony in his own case. Laxity and feebleness in the enforcement of law through judicial action is further produced by numerous delays in procedure, due to the taking of appeals from one court to another, the reversal of lower courts for technical errors, the granting of retrials and of numerous continuances for insufficient reasons. The technical rules of procedure have become a sort of fetish, the maintenance of rights under which is too frequently considered as an end in itself, without regard to whether any substantive right has been abridged. In criminal trials, presumptions and benefits of doubt are almost always decided in favor of the defendant, even though the interests and protection of society at large may be jeopardized. If, in spite of this advantage, the defendant should be convicted, he may appeal from one court to another, provided his purse is long enough, but if he is acquitted any attempt on the part of the prosecution to take similar action is ordinarily blocked by the constitutional restriction relating to double jeopardy.<sup>3</sup> Again, if there is so much local prejudice against a prisoner that he will probably not be able to secure a fair trial, a change of venue may ordinarily be had, while the right of the government to such a change, when the sentiment in

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<sup>2</sup> Annual Message of 1910. *Mississippi Senate Journal*, 1910, p. 14. See also Reinsch, *Readings on American State Government*, pp. 173-199.

<sup>3</sup> Though, in a few states, the government may appeal when the verdict is for the defendant on a point of law as distinguished from fact.

favor of the prisoner makes his conviction almost impossible, is considerably more restricted. A change of venue for prejudice of the judge may also be secured, not by transferring the case to another locality, but by calling in another judge to try the case.

### The Jury System

Among the most serious difficulties, however, in the way of efficiency in the administration of punitive justice are the requirements of indictment by a grand jury and conviction by unanimous verdict of a petit jury. Although the grand jury may sometimes be useful in compelling the attendance of witnesses and examining them under oath, and in supporting the public prosecutor in proceeding against powerful malefactors, it is nevertheless on the whole an inefficient and cumbersome body composed of untrained and irresponsible laymen. This inefficiency and cumbrousness is shown in the mistakes which the grand jury makes in selecting the cases to be tried and in failing to examine at all many cases in which true bills should probably be returned. It is said that, in 1911, the grand jury in Chicago released without a hearing 28 per cent of those held on felony charges.<sup>4</sup> Furthermore, the necessity of waiting for grand jury action is one of the most potent causes of delay in criminal proceedings. A remedy for this condition of affairs has already been found in some states where crimes are prosecuted by means of informations prepared by the prosecuting attorney. This increased power of the local prosecuting attorney, however, should be accompanied by an increased degree of central control over him.

A more serious obstacle, however, to efficient law enforcement through court action is found in the system of trial by jury. The difficulties involved in the jury system arise, first, from the method of selecting juries, and, secondly, from the extent of the powers which they exercise. Juries are still selected from the vicinage, though the reason for the rule has long since disappeared. The original reason for this rule was

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<sup>4</sup> *Journal of Criminal Law and Criminology*, IV, p. 197.

in order that the jury should be composed of men having personal knowledge of the facts, but now jurors who know the least about the alleged crime are most apt to be selected. As already noted, the defendant may, under certain circumstances, secure a change of venue, but the trial judge should be empowered to allow the same privilege to the prosecution, under equally justifiable conditions, in spite of the objection of the defendant. From whatever locality the jurors may be selected, partisan political considerations should not be allowed to enter into the choice, and, to this end, the selection should be taken out of the hands of the sheriff and vested in an impartial commissioner appointed by the judges or by central authority. Under the system in which the sheriff draws the grand and petit juries, men are sometimes selected with a view to the protection of offenders having political influence, and not to return indictments or verdicts. In order to remedy this state of affairs, jury commissioners have been provided in some states through judicial selection or appointment by the governor. Thus, Maryland, by an act of 1904, vested in jury commissioners appointed by the governor the power previously possessed by sheriffs to select jurors. Such acts have been held not unconstitutional as an infringement upon the prerogatives of the judiciary.<sup>5</sup>

Even where partisan political considerations have been eliminated, however, it does not follow that an intelligent and capable jury will be selected. In some states the jury panel is drawn by lot or blind chance, and there is no assurance that the least qualified persons in the county may not be selected. Even where character and intelligence are taken into account as far as possible in selecting the panel, the actual trial jury is apt to be composed of persons of but mediocre intelligence and standing in the community. Members of certain professions and persons who would be seriously injured financially by jury service are frequently exempted from that duty, thus eliminating a large proportion of the intelligent and well-to-do residents of the community. This process of elimination is

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<sup>5</sup> *State v. McNay*, 100 Md. 622; *Geiger v. State*, 25 Ohio Cir. Ct. R. 742.

carried a step further through the practice of challenging jurors, either peremptorily or for cause. Persons who have formed some opinion of the case through reading newspaper accounts of it are usually challenged, thus further eliminating the most intelligent class. In this connection it may be noted that the defendant is specially favored by the provision usually found whereby a greater number of challenges are allowed to the defense than to the prosecution.

Not only the method of selecting the jury but also the mode of its operation after selection places obstacles in the way of the efficient administration of justice. It has frequently been noted that, in our state courts as compared with the English courts or even with the Federal courts, the powers and functions of the judge are of less importance in determining the course of the trial. The judge should not be reduced to a mere figurehead, for presumably his greater experience and discrimination in weighing evidence than any jury possesses should qualify him to serve as a guide and mentor to the jury. The exercise of his normal powers to instruct the jury, to summarize and comment on the evidence and to direct the trial in general should be of great service to the jury in reaching a just verdict, and should remain unimpaired. In practice, however, these normal powers of the state judge are greatly restricted. The impotence of the judge is even further accentuated by the provision found in some half a dozen states, to the effect that juries shall be judges of the law as well as of the facts in criminal cases. In such cases, however, the power of the jury is in practice not always as great as this provision might seem to indicate, for it has been held that, under this provision of the criminal code, it is not improper for the court to tell the jury that "if they can say upon their oaths that they know the law better than the court itself, they have the right to do so"; but that "before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court."<sup>6</sup>

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<sup>6</sup> Dougherty, *et al. v. Hughes, et al.*, 165 Illinois, 384; *Hurd's Revised Statutes*, Chap. 22, Sect. 40, Chap. 38, Sect. 431; *Spies et al v.*

A relic of former times still embedded in the jury system is the rule requiring that the verdict be unanimous. This rule not infrequently causes a trial to miscarry through a failure of the jury to agree, and thus necessitates a new trial with the attendant expense and delay. Except, perhaps, in capital cases, there would seem to be no good reason why juries should not be allowed to reach verdicts by a majority or three-fourths vote, as is already allowed in some states. The unanimity rule makes it especially difficult to enforce the law in those portions of the state in which public sentiment is opposed to the enforcement of the law. This would doubtless also frequently be true so long as the jury system is retained, no matter what the vote required to reach a verdict. "A flagrant example of the 'lawlessness' of jurors in Illinois and of the impotency of judges under such a system to prevent outright nullification of the law was recently afforded in Chicago, where thirteen different juries, in the face of incontrovertible evidence, refused to convict saloon-keepers for violating the Sunday closing law, thus presenting an example of a complete breakdown in the machinery of law enforcement."<sup>7</sup> We thus have a system of "jury-made lawlessness, which recognizes rights that are forbidden by law and denies rights that are granted by law."<sup>8</sup>

In homicide cases many defendants are acquitted by the jury in the face of overwhelming evidence. It is well known that in lynching cases it is often practically impossible to secure convictions by juries. It is difficult in the first place to apprehend members of a lynching party, even though the affair be perpetrated in broad daylight by unmasked men. Coroners' juries impaneled to hold an inquest over the bodies of persons lynched, frequently bring in a verdict that the deceased came to his death at the hands of persons unknown. Often this is the end of the matter, as in the celebrated Frank case in

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People, 122 Illinois, 1 (8), following *Davison v. People*, 90 Illinois, 221 (223).

<sup>7</sup> J. W. Garner in *Journal of Criminal Law and Criminology*, II, pp. 183, 184 (1911).

<sup>8</sup> T. J. Kernan, "The Jurisprudence of Lawlessness," *Green Bag*, XVIII, p. 588.

Georgia in 1915. But even if the persons who perpetrated the deed are known and can be apprehended, the attempt to try them by a jury of the vicinage is apt to be a farce. "The case of *State v. Hughes*, charged with participating in a lynching, came up in DeKalb County, Tennessee, in July, 1902, but it was found impossible to get a jury to try the case. The court exhausted a venire of three hundred and fifty, and found every man in the lot disqualified—probably having themselves aided in the affair."<sup>9</sup> In 1912 a negro who had killed a special policeman was burned to death by a mob at Coatesville, Pennsylvania. Fourteen of the alleged lynchers were indicted, seven of them were tried, and the evidence against them appeared to be conclusive, but all seven were found not guilty by the jury, and the prosecuting attorney thereupon asked for the dismissal of the other seven cases.

The inefficiency of the jury system is thus one of the most serious obstacles in the way of the enforcement of state law. It is recognized by public prosecutors that their success in securing the enforcement of state laws that may be obnoxious to public sentiment in their localities depends upon avoiding jury trials as far as possible. One great cause of the failure to enforce the laws against disorderly houses found on the statute books of nearly every state has been the necessity of depending for convictions upon incompetent and even perhaps corrupt juries. In order to avoid this necessity, former Attorney-General Cosson of Iowa drew up and in 1909 secured the enactment by the legislature of that state of a law which has become known as the Iowa Injunction and Abatement Law, and has since been enacted in a number of states. This law avoids the necessity of a jury trial by substituting therefor the action of the equity branch of the courts. It virtually attempts to secure the enforcement of a criminal law by a civil action, permitting proceedings in equity in the name of the state to abate as a nuisance a building used as a disorderly house, and has been upheld as constitutional.<sup>10</sup>

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<sup>9</sup> J. E. Cutler, *Lynch Law*, p. 255.

<sup>10</sup> See, for example, *State v. Fanning*, 47 N. W. 215; *State v. Gilbert*, 147 N. W. 953, relying on 121 Iowa, 482 and 196 U. S. 279.

The action to enjoin and abate the nuisance may be brought by the prosecuting attorney or by a citizen or taxpayer. It has already been considerably used, particularly in Iowa. Its effectiveness consists principally in that, as an equity proceeding, the trial is before a judge instead of a jury, and in that either party has a right of appeal instead of the defendant alone, as in criminal cases. "The justification," says ex-Attorney-General Cosson, "for doing away with the jury system in matters of this nature, and seeking the injunctive remedy, a proceeding in equity, is bottomed upon the fundamental fact that the state which passes the law inherently has and ought to have the power to enforce that law. The injunctive remedy gives to the state this right, and no other method has yet been devised which so effectively gives to the state this power to enforce its own statutes, and yet at the same time violates none of the fundamental rights of the defendant."<sup>11</sup>

It remains true, however, that, in spite of the most efficient methods of procedure that may be devised and enacted into law, efficiency in the administration of punitive justice must still depend to a large extent upon the feeling of respect for the law among the people, and upon a high professional standard of morality and ability among the bench and the bar. This subject has been investigated by an able committee for the National Economic League, and their conclusion is that no panacea is to be found for inefficiency in the administration of justice. They recommend "(1) proper training of the legal profession; (2) giving the bar greater influence in the selection of judges so as to insure expert qualifications in those who are to perform an expert's function; (3) unification of the judicial system and more effective and responsible control of judicial and administrative business; (4) giving power to the courts to make rules of procedure and thus giving the courts power to do what we require of them; (5) improvement of

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<sup>11</sup> See "The Iowa Injunction and Abatement Law," U. S. Senate Doc. No. 435, Sixty-Second Congress, 2nd Session, 1912; also pamphlet with same title published by the American Vigilance Association, New York.



legislative lawmaking both in substance and in technique; and (6) thorough study of the new problems which an industrial and urban society has raised and of the means of meeting them with the jural materials at hand."<sup>12</sup>

### The Indeterminate Sentence

What amount of discipline and training is necessary to reform a criminal, and who is to have the power of determining when the process of reformation has been completed? Although the criminal law is based largely on the idea of punishment, there is also involved the idea of protection to society at large. The criminal law provides for the punishment of specific crimes by imprisonment for a term of years, either definite or within limits. The presumption of the law is, not only that incarceration for that term of years will satisfy justice and provide adequate punishment for the offense, but also that, at the end of such period of punishment, the offender will have been sufficiently cured of his evil tendencies to make it safe to again turn him loose upon society. If this can properly be said to be one of the ends of the criminal law, it must be admitted that it frequently fails to attain it. This is evidenced by the large number of released prisoners who again fall into criminal ways. Moreover, the wide difference in the penalties provided in different states for the same nominal offense indicates that the system of legislative fixation of terms of imprisonment for particular offenses is largely guesswork and without scientific basis. It is impossible for the legislature to fix a definite penalty for a certain crime which will fit all cases. In view of this fact, various modifications in the definite sentence laws have been made. The existence of the pardoning power in the governor is a means of softening the rigidity of the definite sentence law where it would work hardship in particular cases. Moreover, provision may be made in the law for shortening the term of imprisonment as a reward for good behavior, or for life sentences upon the third conviction

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<sup>12</sup> "Preliminary Report on Efficiency in the Administration of Justice," prepared for the National Economic League, by C. W. Eliot, M. Storey, L. D. Brandeis, A. J. Rodenbeck, and Roscoe Pound,

for a felony.<sup>13</sup> The discretion of the court may be widened by a law providing maximum and minimum terms of imprisonment for particular crimes, the exact term to be fixed by the court. In view of the principle, however, that no prisoner should be released until such time as he gives satisfactory evidence that this step can be taken with safety to his own interests and to those of society, even the court is frequently not in a position where it can intelligently settle in advance the length of sentence necessary to effect a satisfactory reformation of the offender.

In order to meet this situation the so-called indeterminate or indefinite sentence has been provided by law in a number of states. Under this law the function of the court is limited to determining whether the accused is guilty. If so, the question as to the length of his term is left to the administrative authorities of the institution to which he is committed, or to a special board, within the maximum and minimum limits fixed by law. The indeterminate sentence was first put into operation in this country in connection with the Elmira Reformatory in 1877, and it is in connection with reformatory rather than penal institutions that it finds its most appropriate application. The effect of its introduction has been to increase the average length of time served by prisoners, as compared with the definite sentence plan. The determination of the question as to whether the discipline and training which the prisoner has received has been sufficient to qualify him again to become a normal member of society is a matter of such delicacy and responsibility that it should be undertaken only in those institutions whose officials have adequate means of judging.

### Parole and Probation

Even under the best conditions, human judgment is, of course, fallible, and, in order to guard against errors of judgment resulting in premature release, the principle of the parole is combined with that of the indeterminate sentence, to which it is the natural complement and corollary. The date of his

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<sup>13</sup> Acts of Indiana, 1907, Chap. 82.

discharge is one of the most momentous in the life of the convict. No matter how complete his reformation may have appeared to be while in prison, if, upon his release he finds all the world against him, he is apt to relapse into his former ways. If, however, employment can be found for him and some oversight exercised over him, his chances of reformation are usually good. By parole is meant the conditional release from imprisonment of a sentenced convict at some point between the maximum and minimum limits of the sentence. The beginning of the period of parole is thus not full release, but imprisonment in the institution is succeeded by a probationary period of supervision or noninstitutional control.

The important elements in an efficient system of parole are a competent board of parole and adequate supervision of the paroled convict by well qualified parole officers. The board of parole is composed either of the board of managers of the institution or of a special body of officers. The number of parole officers is comparatively small even in the most advanced states, and many states have no special parole officers, strictly speaking, apart from the board of parole itself, to which the prisoners released on parole are required to report periodically. They may, however, be placed under the supervision of the sheriff or police officers. While on parole, the prisoner is still legally in the custody of the warden of the prison, and, if he violates his parole, he is subject to be again taken into custody and imprisoned.

There can be little question as to the value of the indeterminate sentence and parole laws in making for the reformation of the prisoner. It is true that some of those released on parole relapse into crime, but not as many as under the definite sentence system. Objection to these laws may be based, however, upon faults in their drawing up or in their administration. They should not be applied to hardened felons nor to petty misdemeanants. Moreover, in order to give the working of the laws a fair trial, there should be more competent boards of parole and more adequate supervision of prisoners on parole.

What shall be done with petty misdemeanants and first offenders for whom imprisonment seems unnecessary? The

answer to this question is found in the system of probation. By this term is meant the conditional release of a prisoner by the court, and commitment to the care of a probation officer before imprisonment. The sentence or its execution is suspended during such time as he is in the care of the probation officer, but if he does not demean himself well, such officer may bring him before the court to be sentenced. As early as 1869 Massachusetts provided for a form of probation in juvenile cases, and in 1878 extended the system to adult offenders. Her law on the subject has been substantially copied by a number of states. It provides for the appointment of the probation officers by the courts. In some states, police officers are selected for this work, but their suitability for it is very questionable.

Upon the character of the probation officers depends to a considerable extent the success of the system. The work of probation and parole officers is similar in character, and there is no good reason why both kinds of work should not be performed by the same officers. Both classes of officers should be under the effective supervision of the same central state authority, which should in turn be closely connected with the general state department of charities and correction.<sup>14</sup>

The indeterminate sentence, parole and probation systems are designed to prevent the increase of crime by bringing reformatory influences to bear upon those who are not confirmed criminals, but who have evinced criminal tendencies. They are in line with the most advanced thought in the science of criminology.

### The Pardoning Power

Just as the governor has the power to veto the acts of the legislature, so he may virtually veto or amend the decisions

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<sup>14</sup> The constitutionality of indeterminate sentence, parole, and probation laws has been attacked on various grounds, particularly in that they encroach upon the constitutional power of the governor to grant pardons, reprieves, and commutations. This view, however, has not generally been taken by the courts. See *George v. People*, 167 Ill. 447; *Dreyer v. Illinois*, 187 U. S. 71; *Woods v. State*, 169 S. W. 558. The unconstitutionality of the Illinois parole law is avoided by making the final release of the prisoner dependent upon the approval of the governor. Cf. Freund, *Police Power*, p. 104, and see *People v. Nowasky*, 254 Ill. 146.

of courts in criminal cases through the exercise of his power of granting pardons, reprieves and commutations. Although the pardoning power was a part of the royal prerogative in England, it has not been generally considered in this country as belonging inherently in the governor's office, and therefore an express grant of the power is necessary to its exercise. It is evidently needful that the power of pardoning or of equalizing sentences should exist in some authority, for in every system of the administration of justice, unavoidable errors and miscarriages of justice may occasionally occur, as, for example, evidence discovered subsequent to a trial may establish the innocence of a convicted man. The exercise of the pardoning power may also become desirable in order to soften the severity and rigidity of the criminal law. This was the condition of the English criminal law at the time of the separation of the American colonies from that country, and also to a large extent of the colonies themselves, who inherited the English common law. The severity of the criminal law both in England and in America was relieved in part through the growth of numerous technicalities of legal procedure which gave the accused every opportunity to secure his acquittal and though the refusal of juries to convict except in clear cases, and in part through the exercise of the pardoning power by the king or the governor. In relieving the severity of the criminal law, the governor acts as a sort of criminal court of equity, although his judgments and decisions are not yet based on such generally understood rules as those of equity jurisdiction, but still rest largely upon his individual conscience or caprice. The practice of different governors in granting pardons, therefore, is likely to vary just as did the measure of the chancellor's foot. Records of precedents and settled rules for the guidance of the executive are largely lacking. The old severity of the criminal law has now largely disappeared, but the technicalities of legal procedure, the wide latitude of appeal, and the possibilities of reopening the case, which were designed in part to remedy the effects of such severity, still remain. The necessity, therefore, for the existence and exercise of the pardoning power is not now so great as was formerly the case.

The pardoning power is one of the few powers, if not the sole one, of the governor, the vigorous exercise of which has not met with general approval. Complaints have frequently been made that the governor has set rascals free to roam at large, either because he has been imposed upon by designing friends or has not had the backbone to withstand the tears and entreaties of wives and relatives of the convicted persons. Abuses of this sort have undoubtedly occurred not infrequently, and have given rise to the demand that the power be hedged around with such restrictions as will prevent the recurrence of such abuses. As a matter of fact, the power has seldom if ever been granted to the governor absolutely without restriction. The limitations which rest upon the exercise of the pardoning power by the governor may, in general, be classified into three groups: first, those as to the offenses to which it may extend; secondly, those as to the time when it may be exercised; and thirdly, those as to the manner of its exercise. Cases of impeachment are nearly always excepted from the governor's pardoning power, and treason is usually also excepted, and sometimes murder.<sup>15</sup> Where cases of treason or murder are excepted, it is usually provided that the governor may grant reprieves in such cases until the next session of the legislature. In Connecticut, the governor is given by the constitution the power of granting reprieves only, which may extend no further than the end of the next session of the general assembly.

Under the Constitution of the United States, the President has the power of granting reprieves and pardons without limitation as to time, that is, at any time after the offense has been committed, whether before or after conviction.<sup>16</sup> The states, however, have not in general seen fit to leave the governor's pardoning power thus unrestricted. The governor may ordinarily issue a pardon after conviction, or even after the sentence has been served and the prisoner has been released, but the power of "previous pardon," that is, before conviction,

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<sup>15</sup> If the governor himself is under impeachment, a pardon granted by him is void. *People ex rel. Robin v. Hayes*, 143 N. Y. S. 325.

The governor cannot grant pardons in cases of civil contempt.

<sup>16</sup> *Ex parte Garland*, 4 Wall. 333.

is granted to him in very few states. Inasmuch as a person accused of crime is presumed to be innocent until found guilty, there is something apparently illogical in pardoning him. But though there is a legal presumption of innocence, there is often a popular assumption of guilt. The main arguments in favor of the existence of the power of previous pardon are that it may be desirable to pardon subordinate accomplices in order to obtain evidence against the principal offenders and, in times of political excitement, to prevent the arrest and imprisonment of persons against whom there may be prejudice and false charges.<sup>17</sup> Evidence of the sort mentioned, however, may usually be obtained through promise of immunity from prosecution on the part of the prosecuting official. The exercise of the power of previous pardon is equivalent to the entry of a *nolle prosequi*, and as such entry may usually be made, under certain restrictions, by the attorney-general or the local prosecuting attorney, there would seem to be no sufficient reason for giving the governor this additional power of interfering in the proceedings of criminal courts. The existence of such a power even contains the possibility of transferring the trial of many criminal cases from the courts to the governor.

In the third place, restrictions rest upon the governor in regard to the manner of exercising the pardoning power. Such restrictions are designed to promote publicity and regularity of the proceedings, and to create some legal control, legislative or otherwise, over executive action. In order to avoid secret or *ex parte* proceedings on the part of the governor, it is provided in a number of states that the power is to be exercised subject to such regulations as may be provided by law relative to the manner of applying for pardons, and that all grants of pardons, reprieves or commutations shall be periodically reported, with essential particulars, to the legislature. There is a well grounded feeling that the people of the community in which the crime was alleged to have been committed should be notified and have an opportunity to be heard in regard to the matter. This applies in particular to the judge

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<sup>17</sup> *Debates and Proceedings of the Pennsylvania Constitutional Convention of 1873*, II, pp. 370ff.

who presided at the trial and the district or state's attorney who prosecuted the case. This would assist in guarding the governor from imposition by enabling him to obtain information on both sides with reference to the facts of the case.

Another and more important restriction upon the governor in regard to the manner of his exercise of the pardoning power is the requirement that he may exercise it only in conjunction with some other body. Thus, in several of the New England states, the power may be exercised only with the advice and consent of the council or senate. More usually, however, the body participating with the governor is a board, created by the constitution or by statute, and composed of *ex officio* or specially appointed members. The participation of such a board in the exercise of this power was advocated by Francis Lieber, who held that it was "best to establish by law a board of say five members, one or two of them to be judges, without the written report of which board to the governor, no pardon should be permitted, or whose consent, after full investigation of the case, should be necessary for the validity of the governor's pardon."<sup>18</sup> In states where such boards are created by the constitution they are usually composed of *ex officio* members, and their consent is necessary to the valid exercise of the pardoning power. When such boards are created by statute, however, after the constitution has vested the pardoning power in the governor, their functions consist merely in hearing applications for pardons and in giving advice and recommendations to the governor, which he may follow or not, as he sees fit.

It is doubtful whether the time and attention of the chief executive officer of the state ought to be taken up with matters of individual application, such as pardons. The possession of this power is apt to subject him at times to political pressure and personal influences which it may be almost impossible for him to resist, and, at all events, it is usually impracticable for him, immersed in more important duties, to give to the numerous applications for executive clemency the amount of careful

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<sup>18</sup> *Reflections on the Changes Which May Seem Necessary in the Constitution of New York* (1867), p. 13.



consideration which they deserve. Certainly the assistance of some agency, such as a board of pardons, to sift the applications and make recommendations, is desirable. The existence of special boards, moreover, tends to bring about a greater regularity of procedure and more settled rules for the determination of the question as to whether a pardon shall be granted. Thus the participation of boards is beginning to give to the granting of pardons something of that definiteness and regularity of procedure which equity jurisdiction long ago acquired through the accumulation of precedents. Pardoning boards give a quasi-judicial character to the process of sifting applications, and that they are generally better qualified than the governor to act upon them is tacitly admitted in the usual practice of governors in following the recommendations of such boards, even though legally they are merely advisory.

The power of pardon is sometimes expressly vested to some extent in the legislature as well as in the governor. Thus, the legislature may pardon for treason when the governor merely has the right to reprieve for this offense. There is a difference of opinion, however, as to whether the grant of the power of pardon to the governor operates to exclude the legislature from any participation in it. Such is probably the effect usually with respect to acts of individual application, except in the case of the remission of fines and forfeitures, but the legislature may by law make general rules extending pardon to a number or class of persons through amnesty, or commuting the sentences of prisoners under certain conditions through the enactment of laws providing for shortening of terms for good behavior. Such "good time," however, which is tantamount to conditional commutation of sentence, may be forfeited by particular prisoners whose behavior, in the judgment of the prison authorities, has not been good.

When the governor is vested with the general power of pardon, he may exercise it, under the common law, so as to grant either absolute, limited, or conditional pardons.<sup>10</sup> The right to grant conditional pardons is also sometimes expressly

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<sup>10</sup> Provided the conditions are not illegal, immoral or impossible of performance. See *Ex parte Wells*, 18 How. 307.

recognized in the constitutions, and the governor is sometimes also authorized to transfer prisoners from the penitentiary to the reformatory. The difficulties encountered by governors in granting conditional pardons consist principally in determining whether the person to whom such a pardon has been granted is observing the conditions, and in getting him back into custody if he is not. The general rule is that the questions as to the identity of the prisoner and whether he has broken the conditions can only be determined by judicial action, though such action is not always had, and it has been held that, under a parole accepted by a convict, the governor can order him remanded without notice or opportunity to be heard.<sup>20</sup>

The exercise by the governor of the power of conditional pardon has become less necessary with the introduction in a number of states of the indeterminate sentence and the parole system. The latter system is similar to the conditional pardon of the governor, but differs from it in that the prisoner on parole is considered to be still in the legal custody of the prison authorities or of the parole board, who may remand him into actual custody at any time, and also in that prisoners convicted of certain crimes are sometimes excepted from the operation of the parole system. The advantage of the parole system over the method of conditional pardon by the governor lies in the fact that, as actually administered, it provides more effective means of determining what prisoners should be placed on parole, and more effective supervision over them while on parole. In view of this fact it is doubtful whether the governor ought to exercise his power of conditional pardon, and, *a fortiori*, his power of absolute pardon, except in very unusual circumstances, in the case of a prisoner to whom the parole system may be applied.

The effects of the exercise by the governor of his power of absolute pardon are either direct or indirect. The direct effects are not only to liberate the prisoner, but also usually to restore to him most of those political and civil rights of which his conviction automatically deprived him. Indirect and more

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<sup>20</sup> *Ex parte Horine*, 148 Pac. 825 (Okla., 1915).

remote effects, however, may also sometimes be sought by the governor through the exercise of this power. A governor opposed to capital punishment as a general proposition might defeat the law of the state on this subject by pardoning absolutely all persons convicted of capital offenses. Some governors have exercised the pardoning power to such an excessive extent as to amount almost to a general jail delivery. It hardly seems justifiable for the governor to pervert the pardoning power from its proper use in order to accomplish such ulterior results.

### Judicial Review of Legislation

When a case is brought before a court for determination, it is the duty of the court to decide the case in accordance with such law as it may find applicable. If, however, there are two laws both of which are applicable to the case, but they are in irreconcilable conflict with each other, the court must make a choice between them, applying one but giving no effect to the other. If these conflicting laws are of equal grade or if they are enacted by the same legislative body, the court applies the one of later date and ignores the earlier. The distinction between different grades of laws, however, has become well grounded in the United States, so that, if one law bearing on a case is fundamental and the other is not, the court applies the former and refuses to apply the latter to the case in so far as it is in conflict with the fundamental law or constitution. The exercise of this power by the courts was held by Chief Justice Marshall in the famous case of *Marbury against Madison* to be necessarily implied in the very nature of a written constitution. That this is logically true may well be doubted, but the principle he enunciated is nevertheless well established. Since the establishment of state governments following the Revolution, state courts have in many cases assumed to exercise the extraordinary power of refusing to apply to a case before them a statute which they deem to be in excess of the power of the legislature to enact on account of the limitations of the state or Federal constitutions resting upon the exercise of legislative power. Although this is a weapon of large caliber,

it may nevertheless be exercised by any of the courts from the highest to the lowest.

In most cases the courts have assumed to exercise this power without specific authority granted to them in the constitution to do so. In some state constitutions, however, the power is now clearly implied, as in the provision of the constitution of Illinois that from the appellate courts "appeals and writs of error shall lie to the supreme court in all cases in which the validity of a statute is involved."<sup>21</sup> From the adoption of the Illinois constitution of 1870 to the end of the June term of the supreme court in 1913 the validity of laws was passed upon by that court in 789 cases, in which the acts concerned were declared void in 257 cases and upheld in 532 instances. The great increase in the length of state constitutions within recent decades and the minute details into which they go has increased considerably the hazards of legislation, and many more instances consequently arise in which the courts are called upon to declare laws unconstitutional. Moreover, the legislature not infrequently passes laws of doubtful constitutionality with the intention of putting the question up to the courts. This practice amounts to a "referendum to the courts in legislation."

Many limitations upon the legislature have been placed in the state constitutions which have tended to increase greatly the number of cases in which the constitutionality of laws is involved. With reference to such limitations, it has been declared that the general assembly is not the final judge of such limitation; but when the question arises in a judicial proceeding, the court must compare the particular act with the fundamental law; and, if found to be in conflict, the limitation must be enforced. Or, as it was expressed in another case, "the courts are bound to obey both the constitution and the statutes, but in every case of a conflict between the two the constitution, being the highest written law of the State, must prevail."<sup>22</sup> To the extent, however, that an act of the legislature is expres-

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<sup>21</sup> Constitution of Illinois, Art. VI, Sect. 11.

<sup>22</sup> Constitution, Art. VI, Sect. 11; Wright, *Judicial Control of Legislation in Illinois*, 47-48; Knopf v. People *ex rel.*, 185 Illinois, 20; Haller Sign Works v. Physical Culture Training School, 249 Illinois, 436.

sive of discretion and judgment, its action must be regarded as final and not within the power of courts to review, unless the discretion has been so grossly abused as that it may be said not to have been exercised at all.<sup>23</sup>

The importance of the judicial control over legislation arises not only from the number of cases in which the validity of statutes is involved, but also from the importance of the statutes concerned. The power of the state courts in this respect extends not only to acts of the state legislature but also to acts of congress.<sup>24</sup> It also extends to declaring state law unconstitutional not only with reference to the state constitution, but also with reference to the Federal constitution. In fact, it becomes the duty of state courts to do so in view of the provision of the Federal constitution declaring that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Many constitutional limitations are fairly definite, but the most important ones are rather vague and indefinite, thus leaving more discretion to the courts in construing them with reference to their bearing on the validity of legislation. Many legislative acts have been held unconstitutional as being in conflict with the provision of the bill of rights to the effect that "no person shall be deprived of life, liberty or property, without due process of law." The line of decisions of the courts, however, in which the construction of this provision is involved has not clearly defined its meaning; and it is impossible to foretell the fate of a measure which is running the gantlet of the courts' interpretation of due process. Some acts of the legislature have also been held unconstitutional as violative of the article of the constitution providing for the distribution of powers among the three distinct departments, legislative, executive, and judicial. This does not mean that the departments shall be kept so entirely separate and distinct as to have no connection with or dependence upon each other. From the principle of separation of powers, how-

<sup>23</sup> People *ex rel. v. Carlock*, 198 Illinois, 150.

<sup>24</sup> See, for example, People *ex rel. v. Brady*, 271 Illinois, 100 (1911), in which parts of the Federal Reserve Act were held unconstitutional.

ever, it follows that if the powers and duties of an officer belong to the judicial department, he must either be elected by the people as the ultimate sovereign authority of the state, or his appointment and removal must be vested in the judicial department, and his appointment cannot be delegated by the legislature to some other body, such as a county board, nor his removal to a civil service commission. It follows that the power to select officers who are to act as assistants to the court in the performance of judicial functions rests in the judicial department and is necessary to the independent exercise of judicial power and the separation of the judicial department from the other departments which are prohibited from exercising its functions. The principle of separation of powers is not an insurmountable bar to the conferring of certain nonjudicial functions upon the courts, provided they are not incompatible with the proper performance by the court of its strictly judicial duties.

The principle of separation of powers is also involved in the question of the power of the courts to entertain appeals from the orders and decisions of administrative bodies and officers. In the case of the *City of Aurora v. Schoeberlein*<sup>25</sup> the supreme court of Illinois had under consideration the constitutionality of a section of the Civil Service Act which allowed an appeal from the decision of the civil service commissioners to the circuit court. This provision was held invalid on the ground that it attempted to delegate executive power to a judicial body. In the course of the opinion, the court pointed out that there could be no appeal in the legal sense unless there had been a decision by a judicial tribunal. Under this ruling, therefore, the courts do not possess jurisdiction to review the findings of fact of an administrative body. In questions of the interpretation of the laws, however, the courts may exercise jurisdiction over cases carried from such bodies on writs of *certiorari*.

Although, in legal and judicial theory, the action of the courts in declaring statutes unconstitutional consists merely

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<sup>25</sup> 230 Illinois, 496.

in applying the law as they find it to the facts of the case and in discarding the less fundamental law in favor of the more fundamental when there is a conflict between the two, nevertheless in reality the exercise of this power is the performance of a discretionary and political act. The result of its exercise is equivalent to the exercise of the legislative power of repealing a statute, which is clearly a political act. The frequent exercise of this power by the courts, therefore, tends to engender the idea that the courts constitute a branch of the political department of the state government, and to encourage the movement in favor of subjecting them to greater political responsibility. In connection with this topic a competent authority has declared that "the judicial power to pass on the constitutionality of legislation, as exercised by state courts with reference to state constitutions for the last three or four decades, has degenerated into a legislative power of veto, inviting parties beaten in the legislature to transfer their fight to the courts, converting the highest courts of the states into anomalous third legislative chambers, where political questions of governmental policy are debated and resolved by lawyers and judges under the guise of debating and resolving legal questions of governmental power, substituting the arbitrary will of judges for the expressed will of the people, undermining and destroying the principle of the supremacy of law, converting it into an intolerable supremacy of judges, where the will and not the law has dominion."<sup>26</sup>

The exercise by the courts of the power of declaring laws unconstitutional has given rise to considerable popular dissatisfaction at times because it seemed to stand in the way of social reforms the need for which was widely and keenly felt. Social legislation was sometimes held void as being in conflict with broad constitutional guaranties, the meaning of which was so vague and indefinite that their construction depended very largely upon the social and political philosophy of the particular judges rendering the decision of the court. In such cases the judges were often accused of adopting a reactionary attitude

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<sup>26</sup> Schofield, "The State Civil Service Act and the Power of Appointment," *Illinois Law Review*, VII, p. 343.

and of maintaining unduly the sanctity of private rights where they conflicted with public welfare. Where such decisions were rendered by a bare majority of the court, severe criticisms of the attitude of the majority were sometimes found even in the opinions of dissenting judges. Such popular dissatisfaction led to the proposal of such devices as the recall of judges and the recall of judicial decisions, which, as we have seen, is in substance a plan for a popular referendum on a question of constitutional interpretation in case of conflict over the question between the legislature and the courts. It is of course not within the proper province of the courts to lead reform movements or to espouse particular social theories. It is their duty to apply the law as they find it, and if the constitution as construed by the courts is not abreast of modern conditions or in harmony with preponderant public opinion, then it should be amended by the regular amending process. In some states, however, this is a difficult process. Moreover, by their very training, judges are inclined to be conservative, and it is hardly to be expected in the nature of things that the construction placed by the courts upon the constitution and laws will not be influenced to some extent by the personal views of the judges upon questions of public policy.

Although it probably does not happen as frequently as is popularly supposed, it has happened, in an appreciable number of cases, that legislative acts are declared unconstitutional by a bare majority of the court. The fact that there is a large dissenting minority would seem to cast some doubt upon the invalidity of the act. The courts themselves frequently lay down the rule that legislative acts should not be held void as violative of the constitution unless clearly in conflict with the fundamental law. In practice, however, they do not always follow this rule. On the contrary, they sometimes seem inclined to declare acts unconstitutional if there is any possibility of construing the constitution so as to have that result. In order to check this tendency, some states have adopted express constitutional limitations designed to curb the unrestricted power of the courts to declare legislative acts unconstitutional. Thus, in Ohio and North Dakota, having seven and five judges re-



spectively on their supreme benches, it is provided that laws can be declared unconstitutional only by the concurrence of six and four judges, respectively. Under its constitution of 1920, Nebraska requires the concurrence of five out of the seven judges. In states where the supreme courts may meet in separate divisions for the decision of ordinary cases, it is usually the rule that cases involving the constitutionality of laws can only be decided by a majority of the full bench.

The power of the courts to declare laws unconstitutional seems to make the judiciary paramount over the other departments of the government. In theory, it is not a case of a conflict between the legislature and the courts, but rather a conflict between different grades of law. In effect, however, it seems at first sight to subordinate the legislature to the courts. The judiciary, however, is on the whole the weakest department of the government and its powers are narrower than those of the others. It neither holds the purse nor wields the sword.

No department can be expected to enforce constitutional limitations upon itself. In cases of doubt as to whether a governmental power exists within the limits of the constitution, the matter might be referred for determination to the original source of governmental authority, *viz.*, the people; but this would hardly be practicable as a regular mode of procedure. The only alternative, therefore, if constitutional limitations are to be enforced, is to intrust that function to some one department of the government. Since the primary function of the judiciary is to construe and apply the law, it is the department of the government which seems to be best fitted for this purpose. In passing upon the validity of laws, the judiciary is likely in most cases to consider the question more disinterestedly than would the department in which the laws originated.

If the action of the judiciary in holding laws unconstitutional should give rise to much popular dissatisfaction, and the constitution is so difficult to amend that this remedy is impracticable, a further remedy remains, and that is, through the force of public opinion to influence the courts to adopt an attitude toward legislation more in consonance with its demands. It

may happen, however, that the attitude of the judiciary in particular cases, although giving rise to some popular dissatisfaction for the time being, will ultimately be approved by the sober second thought of the people. The power of the courts rests at bottom upon the support of public opinion, and their continued exercise of the power of declaring legislative acts unconstitutional must ultimately depend upon the fact that their policy meets with popular approval.

### Judicial Review of Administrative Action

The idea that judicial review is necessary to safeguard individual rights is still strongly embedded in the laws, and conclusiveness of administrative determinations by state authorities is seldom found. It happens not infrequently, however, that, for practical purposes, the action of state administrative authorities may be final in the sense that nothing further is actually necessary to secure the enforcement of the law. The laws regarding the safeguarding of machinery in factories, for example, are usually enforced through inspection by the agents of the state factory department, who give instructions as to such changes as may be necessary to satisfy the requirements of the law. These instructions are usually complied with, and prosecutions are therefore seldom necessary. The preventive rather than punitive character of state administrative action also frequently renders resort to court procedure unnecessary. Moreover, even when court action becomes necessary, the scope of judicial review may in various ways be narrowed and that of administrative action correspondingly broadened. Thus, judicial review may have to do merely with the methods whereby the determination was reached and not with the subject matter of the determination, or, no appeal may be allowed from the decision of the commission upon any question of fact. The scope of administrative action of a state board may also be virtually widened through the provision, making it unnecessary that such board should bring prosecutions to secure compliance with the law or punish violations of it, but empowering the board to enter and enforce directly an order, which becomes the final determination of the matter

unless the individual or corporation against whom the order is entered appeals from such order to the proper court. In spite, however, of the gradually narrowing scope of judicial review, it still remains true that administrative action is largely preliminary in character, and for the final enforcement of the law or for the imposition of penalties for its violation and even, in some cases, for the holding of preliminary proceedings, resort to court action is still necessary.

The control of the judiciary over the administration sometimes operates to enfeeble the instrumentalities provided for the enforcement of law. The power of the courts to issue injunctions may be used not only to secure the enforcement of law by abating a nuisance, but it may also be used in such a way as virtually to paralyze the executive arm of the government in moving against the violators of law. Administrative boards are enjoined from slaughtering infected cattle. In spite of an anti-tipping law, the head of the "tipping trust" continues to collect tips under the protection of an injunction prohibiting hotels and restaurants from canceling his contracts with them. Police officers are enjoined from raiding notorious establishments or from preventing palpable violations of the law. Thus, an internal conflict takes place among different agencies of the government which should work together in effective coöperation in law enforcement. This situation is merely one of the manifestations of the overemphasis upon law and individual rights as contrasted with administrative efficiency and the welfare of society. There is a "common-law distrust of administration, which results in putting upon criminal law much that is purely administrative, for which its methods and machinery are ill-adapted. The two rival agencies in government are law and administration. Administration achieves public security by preventive measures. It selects a hierarchy of officials to each of whom definite work is assigned, and it is governed by ends rather than rules. It is personal. Hence, it is often arbitrary and is subject to the abuses incident to personal as contrasted with impersonal or law-regulated action. But well exercised, it is extremely efficient; always more efficient than the rival agency can be. Law, on the other hand,

operates by redress or punishment rather than by prevention. It formulates general rules of action and visits infractions of these rules with penalties. It does not supervise action. It leaves individuals free to act, but imposes pains on those who do not act in accordance with the rules prescribed. It is impersonal, and safeguards against ignorance, caprice or corruption of magistrates. But it is not quick enough or automatic enough to meet the requirements of a complex social organization." <sup>27</sup>

### Judicial Reform

There is widespread popular dissatisfaction with the courts, due to the fact that judicial procedure is often beset with technicalities which cause such numerous and inordinate delays in the disposal of cases as practically to amount to a denial of justice. Litigation is expensive; judicial machinery is cumbrous; the courts are lacking in proper organization and coördination. The work of the courts is to a considerable extent in the nature of administrative business, yet it has not usually been managed in a businesslike way. Under present conditions, there is no administrative head of the so-called judicial system of the state. If justice miscarries, no one is directly responsible; there is no one whose business it is to supervise the working of the whole judicial machinery. Some judges may be overworked and others comparatively idle, yet no one has authority to assign and transfer judges for the better and more efficient handling of the work. Theoretically, the courts of a state constitute a system with the supreme court at its head and the chief justice at the head of that court. This theory is clearly implied by constitutional provision in Michigan, Missouri, Oregon, and other states. But the theory is generally widely at variance with the facts. There should be one general court for the state, of which the existing courts should be merely branches. There should be a chief judicial superintendent, who will act as the administrative head of the state

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<sup>27</sup> Roscoe Pound, "Inherent and Acquired Difficulties in the Administration of Punitive Justice," *Proceedings of the American Political Science Association*, IV, pp. 232, 233.

judicial system in a way that a rotating chief justice cannot.

It has been said by a competent authority that "Instead of a unified judicial system we have a jumble of disconnected and disjointed courts each pursuing its own way with but little regard to any other. . . . As a system it has neither head nor tail. The supreme court has no power to direct the work of any other court or lay down a single rule for their adoption, while any justice of the peace may declare all laws of the legislature unconstitutional and void. Different methods of procedure prevail in the different courts, resulting often times in the greatest confusion."<sup>23</sup> The truth appears to be that the courts are still organized, in the main, according to the plan and principle which were considered proper and suitable for the states in their infancy, when scantily populated and largely rural in character. Under the present system judges have no opportunity of becoming specialists in the disposition of particular classes of cases, although some tendencies toward specialization in character of function can be discerned, as in the case of the probate courts and such quasi-judicial tribunals as state public utilities commissions. For the most part, however, such specialization as exists is based merely on the territorial principle. Specialization according to the nature of the work to be performed and the character of the cases to be adjudicated is much more satisfactory from the standpoint of increasing the experience, expertness, and efficiency of the judiciary. This is especially true in metropolitan districts, where the evils resulting from lack of proper specialization and coördination of the courts have been most felt.

A committee of the Illinois state bar association on judicial administration, reporting in 1909, complained that "there is the lack of any rational grouping of judges for the purpose of sitting continuously in certain classes of litigation, so as to become unusually expert in the handling of the trial of such cases"; and also a "lack of any authority in an administrative head, which may be exercised for the purpose of controlling the permanent assignment of judges for different classes of

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<sup>23</sup> Gemmill, "What is Wrong with the Administration of Our Criminal Laws?" *Journal of Criminal Law and Criminology*, IV, pp. 701, 702.

work.”<sup>29</sup> The need here indicated has been supplied to some extent in Cook county through the establishment of the municipal court, with a chief justice having large authority over his subordinates. There is still a need, however, for the consolidation of the courts of Cook county under a system of complete coördination of its different branches and direction of an executive head.<sup>30</sup>

In a metropolitan area, such as Chicago, there should be but one court, with divisions or branches for various classes of judicial work. The increasing complexity of modern social and industrial conditions necessitates, especially in the metropolitan areas, an increasing specialization in the organization and functions of the courts. As the tendency toward specialization proceeds, however, the greater becomes the need of coördination of the courts in order that the judicial system may be properly integrated.

Within recent years, steps have been taken in some states toward bringing about a better organization and coördination of the courts and a greater unification of the judicial machinery. By act of 1919 a judicature commission was created in Massachusetts, which made a thorough investigation of the judicial system of the state and recommended that a judicial council be created of from five to nine members, composed of the chief justice of the supreme judicial court and certain other judges and members of the bar assigned by him. The council was to exercise merely advisory powers, studying the system continuously, recording statistical data, and making recommendations and suggestions to the judges of the various courts in regard to rules of practice and procedure. Clerks of the various courts were to make such reports to the council as might be required. While full rulemaking powers were not conferred upon the council, its suggestions in regard to rules would undoubtedly have weight. Moreover, one decided benefit of the plan would be the provision of means for the collection of judicial statistics,

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<sup>29</sup> *Proceedings of the Illinois State Bar Association*, 1909, p. 98.

<sup>30</sup> This, however, would require constitutional changes. "Report of the Committee on Judicial Administration," *ibid.*, p. 204; 1914, Part I, p. 213.

which are now sadly lacking in most states. On account of this lack, no one really knows what is going on in the scattered courts of the state as a whole, how the different isolated courts are performing their work, what is the state of their dockets, or how they compare with each other in these respects.

The Massachusetts plan has now borne fruit in other states. Following the passing by Congress in 1922 of an act to create a council of judges to supervise the work of the United States courts, Ohio adopted a plan in 1923 following substantially the recommendations of the Massachusetts Judicature Commission. It provides for a judicial council of nine members, composed of the chief justice of the supreme court and two associate justices of that tribunal and representatives of various other courts in the state and members of the bar. It has general advisory powers with reference to rules and practice and procedure in the various courts, and is required to make biennial reports to the legislature as to the work of the various branches of the judiciary, with recommendations for changes of existing conditions.<sup>81</sup> In the same year a somewhat similar plan was adopted in Oregon.<sup>82</sup>

The plans for unifying the judicial system as thus far adopted constitute promising steps in the direction of progress in remedying the headless and disjointed lack of system which now exists in most states. They do not, however, go as far as might be desired. They do not provide for the transfer of judges from one court to another and for the equalizing of work.<sup>83</sup> They do not grant full rulemaking powers. They bring about conditions, however, under which larger rulemaking power may safely be granted. The power of determining general policies as to judicial procedure should be retained by the legislature, since

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<sup>81</sup> *Journal of the American Judicature Society*, June, 1923, p. 5; *American Political Science Review*, November, 1923, p. 608.

<sup>82</sup> The plan for the unification of the courts of Missouri embodied in the proposed constitution of 1924 was unfortunately rejected by the voters.

<sup>83</sup> By constitutional provision in Louisiana and Ohio, however, the supreme court or its chief justice is given some power of transferring judges of inferior courts. A similar power may be exercised in Wisconsin by the Board of Circuit Judges.

matters of procedure are intimately associated with the substance of rights. But within this general limitation the making of rules of pleading, practice, and procedure should be left to the courts.<sup>34</sup> To intrust this function, however, to the judges of each court separately or even to the state supreme court would be objectionable on grounds that would not apply to placing the matter in the hands of a representative body, such as the judicial councils created in Ohio and Oregon.<sup>35</sup>

A potent cause in producing delay in the final disposition of cases is the freedom with which the right of taking appeals to higher courts may be exercised. Ample opportunity of appealing from the decisions of lower courts is doubtless deemed necessary in many jurisdictions on account of the inferior quality of those tribunals and the consequent need of revising their decisions by the abler higher courts. The need for numerous appeals with attendant delays might, therefore, be considerably reduced by improving the quality of the lower courts. Some progress has been made in this direction by unifying the general trial courts in a number of states and cities.

Another cause of popular dissatisfaction with the courts is the expense involved in litigation. On account of the expense of court costs and attorneys' fees, the party with the longest purse has a great advantage in a contest in the courts with a poor man. This situation practically amounts to a denial of justice to the poor man, especially if his claim is a small one. In order to remedy this condition, legal aid societies have now been organized in a number of cities to give legal advice to those unable to pay for it. Furthermore, informal procedure without counsel has now been provided for in the lower courts of some states, such as Massachusetts and California, in cases where the amount

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<sup>34</sup> Considerable rulemaking power has been conferred upon the courts in some states, such as New Jersey.

<sup>35</sup> An excellent plan with reference to the rulemaking power was embodied in the proposed Illinois constitution of 1922. It provided (Sect. 93) that the supreme court should have exclusive power to prescribe rules of pleading, practice, and procedure, but the legislature could set aside any such rule by special law. When set aside in this manner, however, the substitute rule would be made by the supreme court, and not by the legislature.



of money involved is small, with resulting saving in time and expense of litigation. A similar result is secured by special courts of conciliation which have been provided for in some states and a number of cities. Thus, in 1921, North Dakota passed an act establishing a state-wide system for the settlement by conciliation of civil controversies involving small sums. The conciliators are appointed by the district court judges and undertake to settle small cases, and such cases cannot be taken to court until the attempt at conciliation has been made and failed.<sup>36</sup> Much of the expenses of litigation could be avoided if provision were made for the settlement of controversies where possible out of court by compromise or arbitration. The idea of arbitration of commercial disputes has gained some ground in this country. The arbitrators are usually agreed upon by the disputants and are persons who are familiar with the questions involved. A legal sanction is necessary in order to make it compulsory for the defeated party to accept the award of the arbitrators.

Another means of preventing unnecessary litigation is the plan whereby the courts are authorized to issue declaratory judgments in cases where no consequential relief is sought by the parties. This plan has now been adopted in a number of states. It provides that, in advance of the rise of actual legal controversies, but where rights are uncertain, the court may be appealed to for authoritative constructions of contracts, statutes, wills, and other written instruments. The decision of the court is binding upon the parties.<sup>37</sup>

The movement for the establishment of administrative bodies with quasi-judicial powers is, from one point of view, an attempt to secure the administration of justice without encountering the technicalities of procedure as followed in the regular

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<sup>36</sup> The constitutionality of this act has been upheld. *Klein v. Hutton*, 191 N. W. 485 (1922). See R. E. Cushman, in *American Political Science Review*, August, 1923, pp. 434-436; and *Journal of the American Judicature Society*, February, 1923, pp. 133-153. See *ibid*, June, 1923, p. 15, for a somewhat similar plan adopted in Iowa.

<sup>37</sup> The Michigan statute providing for declaratory judgments was declared unconstitutional in *Anway v. Grand Rapids Ry. Co.*, 179 N. W. 350 (1920); while that of Kansas was upheld in *State v. Grove*, 201 Pac. 82 (1921).

courts. The kinds of such bodies most prominently developed in the states are public service commissions and industrial accident commissions. They constitute a promising tendency towards securing greater efficiency in special provinces of the administration of justice.

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## CHAPTER XVIII

### THE STATE AND LOCAL GOVERNMENT

ALTHOUGH the relation between the states and the National Government is based on the federal principle, that between the state and the local governments is based largely on the unitary principle, except in so far as the latter have been granted a measure of constitutional home rule. For the purpose of carrying on the affairs of government in the localities, the state is divided into subsidiary units, which are given the legal status of public or municipal corporations.<sup>1</sup> Such a corporation may be described as "a part of the people of a given state, residing within a given territorial district, who are by law organized into a corporation, *i.e.*, endowed with a legal personality, for the purpose of assisting in carrying on the government within that district."<sup>2</sup> Public or municipal corporations may be classified as urban, rural, or special. These three classes are commonly known, respectively, as cities and villages, counties and townships,<sup>3</sup> and districts of various kinds, such as school districts and drainage districts. Such corporations may sue and be sued, may acquire, hold, and dispose of property and are ordinarily endowed also with the powers of taxation, eminent domain, and subsidiary legislation. On account of the tendency during the last few decades towards the concentration of population in comparatively small areas, the form of government provided for such centers and their relation to the state have become of

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<sup>1</sup> Municipal corporations "are emanations of the supreme lawmaking power of the state, and they are established for the more convenient government of the people within their limits." *Darlington v. Mayor of New York*, 31 N. Y. 164 (1865).

<sup>2</sup> W. W. Cook, "Municipal Corporations," *American Law and Procedure*, IX, p. 5.

<sup>3</sup> Counties, however, are often, and townships are sometimes, both urban and rural.

increased importance, not only from the standpoint of the inhabitants of cities but also from that of the state itself.

With respect to the relation between the city and the state, as distinguished from the state government, the general principle is that the state has complete control over the organization and powers of cities. Of course, in exercising this control, the state cannot take any action which would be in violation of the Constitution of the United States. In practice, however, this limitation is not of much importance. The provision prohibiting the state from passing any law impairing the obligation of contracts does not as a rule limit the state in legislating for cities, since the relation between the state and cities is not of a contractual character.<sup>4</sup> Municipal corporations, as the Supreme Court of the United States has declared, "are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted."<sup>5</sup> What they lawfully do

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<sup>4</sup> As Chief Justice Marshall pointed out in the Dartmouth College case: "The framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government," 4 Wheat, 518. That the charters of municipal corporations are not contracts was decided by the Supreme Court of the United States in *Laramie Co. v. Albany Co.*, 92 U. S. 307, and *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79. See also J. F. Dillon, *Commentaries on the Law of Municipal Corporations* (5th ed., 1911), I, p. 145; R. W. Coolcy, *Handbook of the Law of Municipal Corporations*, p. 142. But where the constitutional rights of creditors are involved, the state does not have an entirely free hand. *Meriwether v. Garnett*, 102 U. S. 472. Thus, "where a state has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound." *Von Hoffman v. Quincy*, 4 Wall. 535.

<sup>5</sup> Cf. Judge Dillon's classical definition of the scope of municipal powers: "First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." *Commentaries* (5th ed., 1911), I, pp. 449, 450.

of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government."<sup>6</sup>

The municipal corporation may be considered as a local governmental unit created for two main purposes; first, for the performance of local functions and the satisfaction of local needs, and secondly, as the agent of the state for the carrying out of state functions in the particular locality. In the latter aspect, it is admitted to be completely subject to the control of the state. In the former aspect, however, it has sometimes been maintained that the municipality has, independently of any specific constitutional provision, an inherent right of local self-government which is beyond legislative control.<sup>7</sup> This view has been adopted by the courts in three states and embodied in constitutional provisions in two others.<sup>8</sup> The great weight of authority in the other states, however, is against this view and it is now generally held that, in both aspects, municipalities are completely subject to the control of the state.<sup>9</sup> It follows, therefore, that the people of a city have no inherent right to choose their own officers, even those whose duties are purely local in character, but that the legislature, in the absence of constitutional prohibition, may vest the appointment of local officers in such state officers or organs as it sees fit.

### Legislative Control over Cities

The forms or methods of control exercised by the states over municipal corporations may be classified as legislative, judicial, and administrative. Legislative control is the oldest and is still in most states the most important method. It is exercised principally in creating municipal corporations and in determining the form of government and scope of powers which they shall

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<sup>6</sup> *Atkin v. Kansas*, 191 U. S. 207.

<sup>7</sup> The classical statement of this view is found in the opinion of Judge Cooley in *People ex rel. Le Roy v. Huriburt*, 24 Mich. 44 (1871). See also F. Hendrick, *The Power to Regulate Corporations and Commerce*, Chap. III.

<sup>8</sup> J. F. Dillon, *Commentaries* (5th ed.), I, pp 154-163.

<sup>9</sup> H. L. McBain, *The Law and the Practice of Municipal Home Rule*, pp. 12-15.

have. In performing this function it is not necessary, in the absence of a constitutional requirement, to secure the consent of the inhabitants of the area to be erected into a municipality, nor may any such inhabitant withdraw from the corporation when once formed except by removing his domicile beyond its boundaries.<sup>10</sup> The method of performing this function is through the grant of a charter which outlines the form of government and powers of the municipal corporation. There are five different plans of charter-framing: special, general, classified, optional, and home rule. It was customary at first for the legislature to grant the charter in the form of a special act, which constituted the organic law of the municipality. In a given state, therefore, there might be as many different forms of city government as there were cities. This plan led to various abuses. There was much legislative tinkering with the government of particular municipalities, and the inhabitants manifested comparatively little interest in a government which they did not control. The time of the legislators was occupied with matters about which they did not have sufficient expert knowledge and familiarity with local conditions to enable them to act wisely. Every session of the legislature brought a crop of special laws amending the charters of various cities. Some of this special legislation was probably enacted mainly for partisan purposes, and much of it, if not positively detrimental to the welfare of cities, was at least unnecessary. On the other hand, the growth and development of cities led to increased needs which could not be met except by the grant of additional powers. Such powers as the cities had, moreover, were strictly construed by the courts. Consequently, for the performance of even a comparatively unimportant new function, it was necessary for the city to apply to the legislature for a special grant, and this could not always be secured without considerable delay and lobbying by municipal officials.

### Constitutional Limitations on Legislative Control

In view of the abuses outlined above, confidence in unrestricted legislative control ebbed considerably, and about the

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<sup>10</sup> Berlin *v.* Gorham, 34 N. H. 266.

middle of the nineteenth century limitations upon such control began to be inserted in state constitutions. Thus, the Ohio Constitution of 1851 prohibited the legislature from passing special acts conferring corporate powers and required it to provide for the organization of cities and incorporated villages by general laws, while the Illinois Constitution of 1870 prohibited the legislature from passing local or special laws incorporating cities, towns, or villages, or amending their charters.<sup>11</sup> These provisions did not affect the extent of the legislature's power over the form of government in cities, but merely prevented it from treating differently cities similarly situated, and it did not necessarily follow that all cities must be treated alike. In 1872, however, Illinois passed an optional general cities and villages act which, together with amendments thereto and supplementary laws enacted from time to time, constitutes the form of government for most of the cities of the state.<sup>12</sup> But in many states, complete uniformity in the legislative treatment of cities was avoided through the adoption of the device of classification. Cities were grouped into a number of classes, having roughly the same general characteristics, and the legislative enactments regarding forms and powers of city government were uniform only within a given class. The basis of classification was usually population, so that when a city, through increase of its inhabitants, moved from one class to another, it was required to change its form of government or to become subject to different charter provisions. Through the loophole of classification, the legislatures were able in some states practically to nullify the prohibition against special legislation. This practice was especially prevalent in Ohio, where the legislature went so far as to create eleven different classes, in most of which there was but a single city, so that, under the form of general laws, that body was in reality passing special legislation. The supreme court of the state finally lost patience with this obvious evasion of the constitutional restriction and, in 1902, held that the differences in population between the classes were so trivial that there was no

<sup>11</sup> Kettleborough, *The State Constitutions*, pp. 387, 1080, 1081.

<sup>12</sup> Since 1904, however, as noted below, special legislation may be enacted for Chicago, subject to referendum.



substantial distinction between them which would justify different treatment within the limits of the constitution.<sup>13</sup> Classifications based upon geographical conditions have also sometimes been attempted. Thus, the legislature of New Jersey passed an act relating to the amount of taxes to be raised in cities, which applied only to seashore resorts. This was held invalid because there was no substantial connection between the condition of contiguity to the sea and the amount of taxes.<sup>14</sup>

Although, in practice, the device of classification has opened the way to certain abuses, the fundamental idea behind it is sound. It represents a compromise between unrestricted special legislation and complete uniformity in the treatment of cities, born of which extremes are undesirable. In most states cities differ from each other to such an extent that no one form of government can be devised which will suit all equally well.

The plan of not absolutely prohibiting special legislation but of requiring the consent of the local authorities or people before such legislation can become effective has been adopted in Illinois and New York. Prior to 1904, the legislature of Illinois found itself impeded by the constitutional prohibition against special legislation in adapting laws to the different conditions found in Chicago as compared with the rest of the state. In that year, however, an amendment to the constitution was adopted whereby the legislature was permitted to pass special laws for the city of Chicago, subject to the requirement that all such laws must be submitted to a referendum of the voters of the city, and no such law may go into effect unless consented to by a majority of the voters of the city voting on the question.<sup>15</sup> This provision has not been fully effective in enabling the city to secure such positive legislation as it needs, but it has occasionally prevented the application of undesired special legislation.

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<sup>13</sup> *State v. Jones*, 66 Ohio St. 453 (1902).

<sup>14</sup> *State v. Philbrick*, 50 N. J. L. 581. A Missouri act prohibiting the city in which the state university was located from granting dramshop licenses was held invalid (*State ex rel. Turner*, 210 Mo. 77), but a New Jersey act giving cities on tidewater the privilege of using such water in connection with sewers was sustained. *State v. Hammer*, 42 N. J. L. 435, cited by W. W. Cook, *op. cit.*, p. 39.

<sup>15</sup> Kettleborough, *The State Constitutions*, p. 389.

Under its constitution of 1894, New York required that special laws must be submitted to the mayor or mayor and council of the city or cities to which they related. The local authorities were allowed fifteen days in which to indicate their acceptance of such special legislation. If not accepted, the legislature might nevertheless repass it and send it to the governor as in the case of other bills, so that the veto of the local authorities was merely a qualified or suspensive veto.<sup>16</sup> By constitutional amendment adopted in 1923, however, this plan was superseded by one whereby the legislature is prohibited from passing special laws relating to cities, except when passed by a two-thirds vote in response to a message from the governor declaring that an emergency exists.<sup>17</sup>

Another compromise between unlimited diversity and complete uniformity in the treatment of cities is what is known as the optional charter plan, which has been adopted in several states, including New York and Massachusetts. The legislatures of those states have enacted laws providing, respectively, for seven and four standard types of government from which any except the largest cities may adopt by popular vote the one which it deems to be most fitted to its needs. These types include the old mayor-council form as well as the newer commission and commission-manager forms of city government. In addition, certain general provisions are included which apply to all cities alike. This plan allows the city a reasonable measure of autonomy without going to the extreme of complete freedom as to the organization of its government.

### Constitutional Home Rule

The plan which allows the cities the greatest amount of freedom in determining their own government is that known as constitutional home rule. It was first adopted by Missouri in 1875

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<sup>16</sup> The veto of the city was absolute, however, if the session expired before the end of the fifteen days allowed for city action.

<sup>17</sup> In this connection, compare the provision of the Michigan constitution prohibiting the legislature from passing local or special laws in any case where a general act can be made applicable, and providing that whether a general act can be made applicable or not shall be a judicial question. Kettleborough, *The State Constitutions*, p. 692.

and has now spread to more than a dozen states.<sup>18</sup> This plan varies in details but, in general, there is a small charter commission elected by the voters of the city which draws up the charter, and this instrument goes into effect when adopted by the majority of the voters. Amendments to the charter may be adopted from time to time when initiated by petition and ratified by popular vote. The provisions of the charter must not conflict with the constitution or the general laws dealing with the carrying out of state, as contrasted with purely local, functions in the cities. Otherwise an *imperium in imperio* would be erected within the state. Certain important state functions, such as those of taxation, education, the administration of justice, and the holding of elections could obviously not be safely left to the unrestricted control of the city. It is difficult, however, to draw the line between state and local functions, and the question must often be left to the courts to decide in particular cases. The home rule charter plan is a method of special legislation for cities and by cities, but avoids many of the defects of such legislation when imposed by the state. It is of benefit both to the legislature and to the city—to the former by relieving it to a large extent of the laborious task of enacting city laws for which it does not have adequate time, and to the latter by relieving it of the necessity of continually importuning the legislature for needed laws; while at the same time it increases the powers and responsibilities of the voters and thereby stimulates them to take a greater interest in local political questions. The plan tends, furthermore, to separate state and local politics. The optional charter plan and, to even a greater extent, the constitutional home rule plan, enables the city to experiment, to introduce innovations, to adopt such form of government, even though comparatively new and untried, as it deems best fitted to its needs, and to assume additional powers not inconsistent with the constitution or general laws of the state. The existence of

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<sup>18</sup> For detailed provisions, see the table in McBain, *The Law and Practice of Municipal Home Rule*, pp. 114-117.

In 1923, New York adopted a home rule constitutional amendment granting to all cities the power to adopt and amend local laws, not inconsistent with the constitution and laws of the state, relating to their government, property, or affairs.

these plans has rendered possible the recent rapid increase in the number of cities operating under the commission-manager type of government.

Other forms of legislative control over cities consist in the enactment of such laws as those limiting the rate of municipal taxation, the amount of indebtedness, and the length of term for which franchises may be granted to public utilities. The limitation on indebtedness is usually fixed at a certain percentage of the assessed valuation of taxable property within the city. This limitation, however, may be, and not infrequently has been, evaded by resort to various subterfuges. Perhaps in this as in other respects, administrative control would have the advantage over that of the legislature by virtue of its greater flexibility and effectiveness.

### Administrative Control over Cities

The Anglo-Saxon principle of local self-government, made possible in England on account of her insular position and subsequently transplanted to our soil, has resulted in the largely decentralized type of administration in the American states. The effects of the endeavor by the framers of the American constitutions to prevent the government from becoming so strong and efficient in action as to endanger private rights and individual liberties are still observable in the present organization of state administration. The subordinate position of the states has made local self-government and decentralization possible because a high degree of administrative efficiency was not found necessary to state life. Tendencies in the opposite direction have not yet developed far enough to eradicate this fundamental characteristic of the state administrative system. But this condition is gradually changing to some extent, for the decentralized and disintegrated administrative system in the state is found to be more and more inadequate to meet the exigencies of the new order.

As has been pointed out above, the legislature, in the absence of constitutional prohibition, may vest the appointment of local officers in such state officers or organs as it sees fit. This has not often been done in the case of purely local officers but not

infrequently the states have vested in central authorities the appointment of state officers whose functions pertain to a particular locality. Conspicuous examples of this are the vesting in state authorities of control over the city police forces of St. Louis, Baltimore, and Boston.<sup>19</sup> In a few states, some state authority, usually the governor, is also vested with the power of removing, under certain circumstances, various local officers, such as mayors, sheriffs, and prosecuting attorneys. In legal theory the various officers, such as sheriffs and states' attorneys, whose functions consist mainly or primarily in the enforcement of state law in their respective localities, are considered to be state rather than local officers. The state is therefore directly interested in the efficiency of such officers in performing their duties. Such officers, however, also usually perform purely local functions as well, and state control over them, through appointment or removal, is a phase of central administrative control or supervision over the localities, which constitutes a departure from the principle of local home rule.

In many states a number of functions have either been entirely taken over by the state, or, if left primarily with the localities, have been placed under the control or supervision of the state. Thus, state civil service commissions may exercise supervision over local civil service boards. Furthermore, state agencies dealing with taxation and local finances, education, public health, the regulation of public utilities and other functions may either exercise supervision over local agencies dealing with the same functions, or may directly control their administration in the localities. This also constitutes, theoretically at least, a departure from the principle of local home rule, but such departure has been rendered necessary by the inadequacy of the local units of government, financially and in geographical extent, to meet the needs for greater efficiency and uniformity in the performance of these functions. Administrative control tends to substi-

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<sup>19</sup> The appointment by the governor of Nebraska of the fire and police board of Omaha was upheld in *State v. Moores*, 55 Neb. 480. In a number of states constitutional provisions have been adopted prohibiting the appointment of "city officers" by state authorities, but many officers having local functions are held by the courts not to be local officers.

tute expertness for the amateurishness of legislative control. For the management of administrative control, all its different lines might to a large extent be concentrated in a state bureau of municipalities.

### Judicial Control over Cities

The control exercised over city governments by the courts arises principally in connection with the enforcement of constitutional and legislative limitations, such as those relating to the amount of indebtedness which a city may incur. If a city issues bonds in excess of the specified amount, the courts will refuse to give relief to a holder of the excess bonds who brings an action against the city to recover principal or interest.<sup>20</sup> If, however, the city expressly enters into a valid contract, its terms will be enforced by the courts just as they would be enforced against a private individual. In this respect the city is unlike the state.

The liability of cities for torts, or civil injuries, depends upon whether the injury is committed while in the performance of a governmental or a private or commercial function. If the former, such as putting out fires or failing to do so, or if police or health officials act negligently, the city is not liable; but if engaged in a private or commercial function, such as supplying water to the inhabitants for a given charge, the city is liable for any tort it may commit. The latter class of function is generally distinguished by the characteristic that the city derives a revenue from its performance. The city is also liable, as a rule, for negligence in the performance of mere ministerial duties.

Judicial control over cities is subject to the same general

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<sup>20</sup> Thus, in *Buchanan v. Litchfield*, 102 U. S. 278, the Supreme Court of the United States held void certain bonds issued by the city of Litchfield, Illinois, because they were issued in violation of Art. IX, Sect. 12 of the constitution of that state which forbids any municipal corporation from becoming indebted in any manner or for any purpose to an aggregate amount exceeding five per cent of the assessed value of the taxable property therein. Nor may the city be held liable on an implied contract to repay the principal of bonds issued *ultra vires*. *Litchfield v. Ballou*, 114 U. S. 190.

limitations which attach to such control in other fields. It lacks promptness and dispatch and in jury cases it is subject to the influence of local sentiment. Moreover, while it is competent to enforce negative limitations with a fair degree of efficiency, it is not well fitted to supervise the performance of positive duties and functions, especially those involving some degree of discretion. In all these respects judicial control is inferior to administrative. The proper field of judicial control is the protection of private rights against invasion by illegal acts of commission or omission on the part of the city.

### Forms of City Government <sup>21</sup>

Although the forms of city government vary greatly in detail, some of their fundamental features may be briefly summarized. The three principal types of city government are those known as the mayor-and-council, the commission, and the commission-manager forms. Of these, the mayor and council plan is the oldest and most widespread. Its organization is influenced by the principle of separation of powers and by the models of the Federal and state governments. The mayor, who is elected by popular vote, corresponds to the president or governor and exercises the same general functions, such as the recommendation, approval and veto of ordinances and the appointment and removal of administrative officials. The administrative departments are officered either by boards or single commissioners, and are sometimes chosen by popular vote, although mayoral appointment is the most usual method of selection.

The city council corresponds to Congress and the state legislatures, but the bicameral system found in those bodies has now been abandoned in most cities and a single house substituted.<sup>22</sup> The members of the city council are elected by popular vote, either at large or by wards, or sometimes by a com-

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<sup>21</sup> For further discussion of the forms of city government, see Appendix.

<sup>22</sup> It should be remarked, however, that many cities never had the bicameral system at all.

bination of these methods. Its principal function is the passage of such ordinances as may be allowed within the limitations of state law. As in the case of other legislative bodies, its work is mainly carried on through committees. The mayor-and-council form of government is somewhat too elaborate and too much influenced by the principle of checks and balances to be suited to the needs of any, except possibly the largest, cities.

### The Commission Form

The commission form of city government originated in 1900 in Galveston, Texas, as the result of the flood of that year which upset conditions in that city. In order to meet the emergency, all the powers hitherto exercised by the mayor, council and administrative officers were vested in a small commission of five persons, elected at large by popular vote. The commission enacts ordinances, apportions among its own members the headships of the various administrative departments, and appoints the more important administrative officials within such departments. One of the commissioners, known as the mayor, presides over meetings of the commission and supervises its work generally. Under the Galveston plan he is not assigned to the head of any particular administrative department, but this is done under the Des Moines plan, adopted in 1907. The latter plan also differs from the former by including the initiative, referendum, and recall. Commission government under either plan has the advantage of avoiding to a considerable extent the evils connected with the over-emphasis placed on the principle of separation of powers in the old mayor-and-council plan, but, on the other hand, it still divides among five persons certain powers which might be more efficiently exercised by one. Moreover, the mayor in the commission plan lacks a position of commanding prominence and influence. Finally, the commission plan is defective in that the members of the commission who are at the head of administrative departments frequently do not have the necessary technical training or expertness to enable them to perform their functions efficiently.



### The Commission-Manager Plan

In order to remedy some of the recognized defects of the commission plan, the city-manager or commission-manager plan of city government was devised. As in the case of the former, so in that of the latter, a flood was the immediate impelling occasion for its adoption. This occurred at Dayton, Ohio, in 1913, and at the beginning of the following year the new plan was put into effect.<sup>23</sup> It constitutes a variation of the commission plan, its distinctive feature being the addition of a chief administrative officer known as the city manager, who is appointed by, and serves at the pleasure of, the commission.<sup>24</sup> The latter body is primarily political, rather than administrative, its chief function of the latter character being the appointment of the manager. It enacts ordinances and passes appropriations, but the actual supervision of the city administration is vested in the manager. He appoints the minor officials, subject to civil service regulations, and sees that the ordinances are enforced. He also advises with the commission generally and, in particular, draws up estimates of financial needs for the commission's consideration.

The theory of the commission form was that all powers of the city government would be concentrated in a body of five persons. In practice, however, it worked out that administrative powers were really divided among the members of the commission individually. The manager plan avoids this defect by concentrating such powers in the hands of one man, who becomes, or already is, expert in the management of city affairs. This plan is on the whole the most promising yet devised for American cities, at least for all except the largest. Mere machinery, however, cannot accomplish a revolution and much depends upon the spirit with which it is operated.

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<sup>23</sup> The city-manager plan, however, had previously been put in operation in one or two smaller cities, such as Sumter, S. C., and Staunton, Va.

<sup>24</sup> In some cities, including Cleveland, which is the largest city having the manager form of government, the commission or council is elected by the system of proportional representation with the single transferable vote.

## The State and Local Rural Government

The principal forms of local rural government are counties, townships and villages. Many varieties of these forms are found in different parts of the country, and their relative importance also varies in different groups of states. The county is the most important of these units in the south and west, while in New England the county is little more than an administrative or judicial district and the town is the leading unit of local government outside the cities.

As in the case of cities, units of local rural government are completely subject to the control of the state government subject to such restrictions as are found in the state constitution. State control in this case is mainly legislative, rather than administrative, though this condition is gradually changing to some extent. The state constitution frequently contains some general provisions regarding the form of county government and specifies that there shall be certain county officers, but this does not prevent the legislature from creating others. The constitution may, as in Illinois, prohibit the legislature from dividing a county or changing the location of the county seat without the consent of the voters of the county.

The county may be classed as a quasi-corporation, and, as such, it has the power to own property, to sue and be sued, and to enter into contracts.<sup>25</sup> In its form of government, the principle of separation of powers is ignored. It has only such powers as are delegated to it by the state. Its principal organ is the county board of supervisors or the board of county commissioners. The former is composed of representatives elected from the various cities and townships in the county and, on this account, is sometimes large and unwieldy. The latter is a small body of three to seven members, usually elected at large. These different types of county government are sometimes, as in Illinois, found in the same state, due to the different lines of immigration by which the state was originally settled. In

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<sup>25</sup> The liability of counties is not so extensive in certain respects as that of cities. Thus the latter are liable for defects in streets and roads, while the former are not. Counties are said to be "quasi-corporations,

counties having the commissioner type of government, the township is likely to be either nonexistent or moribund, while in those having the supervisor type, the township is usually still comparatively vigorous. The principal organ of the town or township is the town meeting, held annually and composed of all the qualified voters in the town. Except in New England, however, this body is of relatively little importance.

The state depends upon the county and the township, especially the former, for the performance of a number of essential functions. Thus, the county is a unit for the enforcement of state law and the administration of justice. The sheriff and the prosecuting attorney, although attached to a particular county, are state officers, and in some states, may be removed from office by state authority. These officials are officers of the lower courts, which are links in the chain of state judicial organization. The county is also the agent of the state for the holding of elections, whether for local or state officers. This is true also in the case of presidential electors and United States senators. The expense of holding the elections and printing the ballots usually comes out of county funds, and the returns are canvassed by county officers. The county, or a group of counties, is also usually the unit of representation in the state legislature and an important link in the organization of political parties. As explained in other chapters, the county is also an important agent of the state in the administration of education, taxation, charities and corrections.

### Special Municipal Corporations

In addition to counties, cities, townships and villages, there are found in most states a number of other quasi-municipal corporations, created for special purposes, such as school, sanitary, drainage, public utility, water, road, park, and others. These were formed partly because the older existing local units

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possessing no power, and incurring no obligations, save those especially conferred or imposed by statute." They "are not liable to a private action at the suit of a party injured, resulting from the nonperformance by its officers of a corporate duty, and no such action lies unless given by statute." *Granger et al. v. Pulaski County*, 26 Ark. 37 (1870).

of government were not suited to accomplish the purpose in view. Sometimes, they were formed in order to evade constitutional debt limitations which restricted local improvements. Such districts have the power to own property, to sue and be sued, to issue bonds and to levy taxes. The corporate powers are exercised by a board of trustees, which is usually elected by popular vote. Although these districts have sometimes accomplished useful purposes which could not have been attained by the ordinary units of local government, their existence tends to complicate the forms of government in the localities and thus to render democratic control more difficult.<sup>26</sup>

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<sup>26</sup> See F. H. Guild, "Special Municipal Corporations in Rural Regions," *Proceedings, Fourth National Country Life Conference*, 1921, pp. 21-27.



## APPENDICES



## APPENDIX I

### A MODEL STATE CONSTITUTION<sup>1</sup>

*Prepared by the Committee on State Government of the National Municipal League*

#### BILL OF RIGHTS

*Section 1.* All political power of this state is inherent in the people, and all government herein is founded on their authority.

*Section 2.* All men are by nature equally free and independent and have certain inherent rights; namely, the enjoyment of life and liberty with the means of acquiring and possessing property and pursuing and obtaining happiness and safety. (*Va. Const., Art. I, Sec. 1.*)

*Section 3.* No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. (*New York Const., Art. I, Sec. 1.*)

*Section 4.* There shall be no imprisonment for debt, except in cases of fraud, libel, or slander, and no person shall be imprisoned for a militia fine in time of peace. Laws shall be passed exempting for individuals a reasonable amount of property from seizure or sale for payment of any debt or liabilities.

*Section 5.* The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety require it, and then only in such manner as shall be prescribed by law.

*Section 6.* The right of the people peaceably to assemble, and to petition the government, or any department thereof shall never be abridged.

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*Section 7.* Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives and for justifiable ends, shall be sufficient defense. (*Neb. Const., Art. 8, Sec. 5.*)

*Section 8.* The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and person or thing to be seized. (*U. S. Const. Amendments, Act 4.*)

*Section 9.* The legislature shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

*Section 10.* No public money or property shall ever be appropriated, applied, donated, used directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or association, or system of religion, for charitable, industrial, educational, or benevolent purposes not under the control of the state.

*Section 11.* In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial in the county or district in which the offense is alleged to have been committed. The right of trial by jury in all criminal cases shall remain inviolate; but a jury trial may be waived by the accused in any criminal case or by the parties in any civil case as may be prescribed by law.

*Section 12.* No bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed; nor shall private property be taken for a public use without just compensation.

## THE LEGISLATURE

*Section 13.* There shall be a legislature of ——— members who shall be chosen for a term of two years by the system of proportional representation with the single transferable vote. For the purpose of electing members of the legislature, the state shall be divided into districts, composed of contiguous and compact territory from which members shall be chosen in proportion to the population thereof, but no district shall be assigned less than five members.

*Section 14.* Until otherwise provided by law, members of the legislature shall be elected from the following districts: The first district shall consist of the counties of ——— and ——— and shall be entitled to ——— members. (The description of all the districts from which the first legislature will be elected should be inserted in similar language.) At its first session following each decennial federal census the legislature shall redistrict the state and reapportion the members in accordance with the provision of Section 13 of this constitution.

*Section 15.* The election of members of the legislature shall be held on the Tuesday next following the first Monday of November in the year one thousand nine hundred and twenty-two and every second year thereafter.

*Section 16.* Any elector of the state shall be eligible to the legislature.

*Section 17.* The term of members of the legislature shall begin on the first day of December next following their election. Whenever a vacancy shall occur in the legislature the governor shall issue a writ of appointment for the unexpired term. Such vacancy shall thereupon be filled by a majority vote of the remaining members of the district in which the vacancy occurs. If after thirty days following the issuance of the writ of appointment the vacancy remains unfilled, the governor shall appoint some eligible person for the unexpired term.

*Section 18.* A regular session of the legislature shall be held annually (or biennially) beginning on the first Monday in

February. Special sessions may be called by the governor or by a majority vote of the members of the legislative council.

*Section 19.* The legislature shall be judge of the election, returns and qualifications of its members, but may by law vest in the courts the trial and determination of contested elections of members. It shall choose its presiding officer and determine its rules of procedure; it may compel the attendance of absent members, punish its members for disorderly conduct and, with the concurrence of two-thirds of all the members, expel a member, but no members shall be expelled a second time for the same offense. The legislature shall have power to compel the attendance and testimony of witnesses and the production of books and papers either before the legislature as a whole or before any committee thereof.

*Section 20.* For any speech or debate in the legislature, the members shall not be questioned in any other place.

*Section 21.* The legislature shall pass no local or special act in any case where a general act can be made applicable; and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected, except acts repealing local or special acts in effect before the adoption of this constitution and receiving a two-thirds vote of all members of the legislature on the question of their repeal. (*Follows Mich. Const., Art. 5, Sec. 30.*)

*Section 22.* A majority of all the members of the legislature shall constitute a quorum to do business but a smaller number may adjourn from day to day and compel the attendance of absent members. The legislature shall keep a journal of its proceedings which shall be published from day to day. A vote by yeas and nays on any question shall, at the desire of one-fifth of those present, be taken and entered on the journal.

*Section 23.* A secretary of the legislature shall be appointed in the manner hereinafter provided. The secretary shall appoint and supervise all employees of the legislature and shall have charge of all service incidental to the work of legislation.

While the legislature is in session the secretary shall be under the control of that body.

*Section 24.* No law shall be passed except by bill. All bills shall be confined to one subject, which subject shall be clearly expressed in the title. Bills for appropriations shall be confined to appropriations.

*Section 25.* No bill shall become a law until it has been read on three different days, has been printed and upon the desks of the members in final form at least three legislative days prior to final passage, and has received the assent of a majority of all the members. Upon final passage the vote shall be by yeas and nays and entered on the journal; provided, that the employment of mechanical devices to record the votes of members shall not be contrary to this provision.

*Section 26.* Every bill which shall have passed the legislature shall be presented to the governor; if he approve he shall sign it, but if not he shall return it with his objections to the legislature. Any bill so returned by the governor shall be reconsidered by the legislature and if, upon reconsideration, two-thirds of all the members shall agree to pass the bill it shall become a law. In all such cases the vote of the legislature shall be by yeas and nays and entered on the journal. If any bill shall not be returned by the governor within ten days after it shall have been presented to him, it shall be a law in like manner as if he had signed it, but if the legislature shall by adjournment prevent the return of bill within ten days any such bill shall become a law unless filed by the governor together with his objections in the office of the secretary of the legislature within thirty days after the adjournment of the legislature. Any bill so filed shall be reconsidered by the next session of the legislature as though returned while the legislature was in session.

*Section 27.* Any bill failing of passage by the legislature may be submitted to referendum by order of the governor if at least one-third of all the members shall have been recorded as voting in favor of the bill when it was upon final passage. Any bill which, having passed the legislature, is returned thereto by the governor with objections and, upon reconsidera-

tion is not approved by a two-thirds vote of all the members but is approved by at least a majority thereof, may be submitted to referendum by a majority vote of all the members of the legislature. Bills submitted to referendum by order of the governor or legislature shall be voted on at the next succeeding general election unless the legislature shall provide for their submission at an earlier date.

*Section 28.* The legislature shall by a majority vote of all its members, appoint an auditor who shall serve during the pleasure of the legislature. It shall be the duty of the auditor to conduct a continuous audit of all accounts kept by or for the various departments and offices of the state government, and to report thereon to the legislative council quarterly and at the end of each fiscal year. He shall also make such additional reports to the legislature and legislative council, and conduct such investigation of the financial affairs of the state, or of any department or office thereof, as either of such bodies may require.

*Section 29.* There shall be a legislative council consisting of the governor and seven members chosen by and from the legislature. Members of the legislative council shall be chosen by the legislature at its first session after the adoption of this constitution and at each subsequent session following a general election. Members of the legislative council chosen by the legislature shall be elected by the system of proportional representation with the single transferable vote, and when elected shall continue in office until their successors are chosen and have qualified. The legislature, by a majority vote of all its members, may dissolve the legislative council at any time and proceed to the election of a successor thereto.

*Section 30.* The legislative council shall meet as often as may be necessary to perform its duties. It shall choose one of its members as chairman, and shall adopt its own rules of procedure, except as such rules may be established by law. The legislative council shall appoint the secretary of the legislature, who shall be ex-officio secretary of the council.

*Section 31.* It shall be the duty of the legislative council to collect information concerning the government and general

welfare of the state and to report thereon to the legislature. Measures for proposed legislation may be submitted to it at any time, and shall be considered, and reported to the legislature with its recommendations thereon. The legislative council may also prepare such legislation and make such recommendations thereon to the legislature, in the form of bills or otherwise, as in its opinion the welfare of the state may require. Other powers and duties may be assigned to the legislative council by law. The delegation of authority to supplement existing legislation by means of ordinances shall not be deemed a delegation of legislative power.

*Section 32.* Members of the legislative council shall receive such compensation, additional to their compensation as members of the legislature, as may be provided by law.

#### THE INITIATIVE AND REFERENDUM

*Section 33.* The people reserve to themselves power by petition to propose laws and amendments to this constitution, and directly to enact or reject such laws and amendments at the polls. This reserved power shall be known as the initiative. An initiative petition shall contain the full text of the measures proposed, and, to be valid, shall be signed by at least ——— voters of the state. Initiative petitions shall be filed with the secretary of the legislature, and the question of adopting any measure therein set forth shall be by him submitted to the voters at the first regular state election, held not less than four months after such filing.

*Section 34.* The people also reserve to themselves power to require, by petition, that measures enacted by the legislature be submitted to the voters for their approval. This reserved power shall be known as the referendum. A referendum petition against any measure passed by the legislature shall be filed with the secretary of the legislature within ninety days after the legislature enacting such measure adjourns sine die for a longer period than ninety days, and, to be valid, shall be signed by not less than ——— voters of the state. The question of approving any measure against which a valid referendum petition is filed shall be submitted to the voters at the first

regular or special state election, held not less than thirty days after such filing.

*Section 35.* A referendum may be ordered upon any act or part of an act, except acts making appropriations for the current expenses of the state government, and for state institutions existing at the time such act was passed, not exceeding the next previous appropriation for such purpose. When the referendum is ordered upon an act, or any part of an act, it shall suspend the operation thereof until such act, or part, is approved by the voters. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of the measures from becoming operative. No act shall take effect earlier than ninety days after the adjournment of the legislature at which it was passed, except acts declared to be emergency measures. If it be necessary for the immediate preservation of the public peace, health, or safety that a measure become effective without delay, the facts constituting such necessity shall be stated in a separate section, and if, upon a yea and nay vote entered upon the journal, two-thirds of the members elected to the legislature shall declare the measure to be an emergency measure, it shall become effective without delay; but no act granting or amending a franchise or special privilege, or creating any vested right or interest, other than in the state, shall be declared an emergency measure.

*Section 36.* If a referendum petition be filed against an emergency measure, such measure shall be operative until voted upon, and unless approved by a majority of the voters voting thereon it shall be deemed repealed. Any referendum measure shall be submitted to the voters at a special election, if so ordered by the governor, or if the referendum petition be signed by ——— legal voters. Any such special election shall be held not less than one hundred and twenty nor more than one hundred and thirty days after the adjournment of the legislature at which the act was passed.

*Section 37.* Except as provided in Section 27 no measure shall be submitted to the people by the legislature except proposed constitutional amendments, and the veto power of the governor

shall not extend to measures initiated by, or referred to, the people. Any measure submitted to a vote of the people shall become law or a part of the constitution only when approved by a majority of the votes cast thereon, provided that at least twenty per cent of those voting at the election vote in the affirmative, and shall take effect upon proclamation by the governor, which shall be made within ten days after the completion of the official canvass, unless otherwise specified in the measure. If conflicting measures referred to the people at the same election shall be approved by a majority of the votes cast thereon, the one receiving the highest number of affirmative votes shall become law. Each measure shall be submitted by a ballot title, which shall be descriptive, but not argumentative or prejudicial. The ballot title may be prepared by the petitioner or by the secretary of the legislature, but in either event it shall be approved by the attorney general as to form, and shall be subject to court review.

*Section 38.* Only registered voters may sign initiative and referendum petitions. Such petitions may be circulated or presented in parts, but each part of any petition shall have attached thereto the affidavit of the circulator that all the signatures thereon were made in his presence, and that to the best of his knowledge and belief each signature is genuine and that of a registered voter. Petitions so verified shall be prima facie evidence that the signatures thereon are genuine, and no other affidavit or verification shall be required. The sufficiency of all petitions shall be decided in the first instance by the secretary of the legislature, subject to review by the court of last resort, which shall have original and exclusive jurisdiction over all such cases. If the sufficiency of any petition is challenged, such cause shall be a preferenced cause, and shall be tried and adjudicated without delay; but the failure of the court to decide prior to the legal date of certification of the ballot by the secretary of the legislature as to the sufficiency of any such petition shall not prevent the question from being placed on the ballot at the election named in such petition, nor militate against the validity of such measure if it shall have been approved by a vote of the people. In the event of legal proceedings to



prevent giving legal effect to any petition upon any grounds, the burden of proof shall be upon the person or persons attacking the validity of the petition. If the secretary of the legislature shall decide any petition to be insufficient, he shall, without delay, notify the sponsors of such petition, and permit at least thirty days for correction and amendment.

*Section 39.* In the preparation of initiative and referendum petitions the services of the attorney general and of the legislative reference bureau of the state, if such shall exist, shall be at the service of the people without charge, for consultation and advice as to constitutionality and form. Not more than one-fourth of the signatures on any completed petition shall be those of the voters of any one county. No law shall be passed to prevent giving or receiving compensation for circulating petitions, but laws shall be enacted prohibiting and penalizing fraudulent practices in the procuring or filing of petitions.

*Section 40.* At least fifty days prior to an election at which any measure is to be submitted to the voters, the secretary of the legislature shall cause to be printed and mailed to each voter, at the expense of the state, a publicity pamphlet containing a copy of all such measures, together with their respective ballot titles. Any citizen or citizens or officers of any organization of citizens may file with the secretary of the legislature for publication over their signatures, in such publicity pamphlet, arguments for or against any measure, and shall deposit at the time of filing such argument the proportionate cost, but no more, of the printing and paper for the space taken by them in such pamphlet.

The initiative and referendum provisions of this constitution shall be self-executing, and shall be treated as mandatory. Laws may be enacted to facilitate their operation, but no law shall be enacted to hamper, restrict or impair the exercise of the powers herein reserved to the people.

#### THE EXECUTIVE

*Section 41.* The executive power of the state shall be vested in a governor, who shall hold his office for a term of four years from the first Monday in December next following

his election. Any elector of the state shall be eligible to the office of governor.

*Section 42.* The governor shall, at the commencement of each session, and may at other times, give to the legislature information as to the affairs of the state, and recommend such measures as he shall deem expedient; and in case of a disagreement with respect to the time of the adjournment he may adjourn the legislature to such time as he shall think proper, not beyond the first day of the next regular session.

*Section 43.* The governor shall take care that the laws are faithfully executed. He shall commission all officers of the state. He may at any time require information, in writing or otherwise, from the officers of the executive department upon and subject relating to their respective offices. He shall be the commander-in-chief of the military and naval forces of the state (except when they shall be called into the service of the United States), and may call out the same to execute the laws, to suppress insurrection or repel invasion.

He shall have power to grant reprieves, commutations, and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor.

*Section 44.* The governor and all civil officers, except such inferior officers as may by law be exempted, shall, before entering on the duties of their respective offices, take, and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of ———, and that I will faithfully discharge the duties of the office of ——— to the best of my ability."

*Section 45.* In case of death, impeachment, or other disability of the governor, the powers and duties of the office shall devolve upon the presiding officer of the legislature for the remainder of the term, or until the disability be removed.

*Section 46.* There shall be such executive departments as may be established by law. The heads of all executive departments shall be appointed and may be removed by the governor. All other officers and employees in the executive service of the

state shall be appointed by the governor or by the heads of executive departments as may be provided by law.

*Section 47.* The governor and heads of executive departments shall be entitled to seats in the legislature, may introduce bills therein, and take part in the discussion of measures, but shall have no vote.

*Section 48.* The legislature may, upon due notice given, and opportunity for defense, remove or retire the governor from office upon the concurrence of two-thirds of all the members elected to the legislature.

### THE BUDGET

*Section 49.* Within one week after the organization of the legislature, at each regular session, the governor shall submit to the legislature a budget setting forth a complete plan of proposed expenditures and anticipated income of all departments, offices and agencies of the state for the next ensuing fiscal year (or biennium). For the preparation of the budget the various departments, offices and agencies shall furnish the governor such information, in such form as he may require. At the time of submitting the budget to the legislature the governor shall introduce therein a general appropriation bill containing all the proposed expenditures set forth in the budget. At the same time he shall introduce in the legislature a bill or bills covering all recommendations in the budget for additional revenues or borrowings by which the proposed expenditures are to be met.

No appropriation shall be passed until the general appropriation bill, as introduced by the governor and amended by the legislature, shall have been enacted, unless the governor shall recommend the passage of an emergency appropriation or appropriations, which shall continue in force only until the general appropriation bill shall become effective. The legislature shall provide for one or more public hearings on the budget, either before a committee or before the entire assembly in committee of the whole. When requested by not less than one-fifth of the members of the legislature, it shall be the duty of the governor to appear before the legislature or to appear in person or by a

designated representative before a committee thereof, to answer any inquiries with respect to the budget.

The legislature, by appropriate legislation, shall make this section effective.

*Section 50.* The legislature shall make no appropriation for any fiscal period in excess of the income provided for that period. The governor may disapprove or reduce items in appropriation bills, and the procedure in such cases shall be the same as in case of the disapproval of an entire bill by the governor.

*Section 51.* No money shall be drawn from the treasury except in accordance with appropriations made by law, nor shall any obligation for the payment of money be incurred except as authorized by law. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates.

## THE JUDICIARY

*Section 52.* On and after January 1, 19—, the judicial power heretofore vested in the (here name all the courts of the state) shall be vested in the general court of justice, which shall have three departments, to be known as the supreme court, the district court, and the county court.

*Section 53.* The justices of the (here name highest court of the state) and the judges of the (here name all the courts of the state except justice of the peace courts) holding office on said first day of January, 19—, shall constitute the first judges of the general court of justice, and shall continue to serve as such for the remainder of their respective terms and until their successors shall have qualified.

*Section 54.* The justices of the (here name highest court of state) shall become justices of the supreme court department of the general court.

*Section 55.* The judges of the district court (or circuit or superior court, as the case may be) and the judges of the (here name any special municipal courts which have a considerable trial jurisdiction) shall become judges of the district court.

*Section 56.* The judges of the county courts (or probate courts, if they are the only courts of county jurisdiction) shall become judges of the county court, and justices of the peace shall be attached as magistrates to the county court branch of the county in which they reside.

*Section 57.* The supreme court shall have and exercise (here insert all the powers and jurisdiction which it may be desired to confer upon the state's highest tribunal). The supreme court shall have power to sit in two or more divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the hearing of certain cases by the full court.

*Section 58.* The district court shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this constitution or by law conferred upon some other department or division of the general court. It shall have such appellate jurisdiction as may be prescribed by general rules made by the judicial council, or by law.

*Section 59.* The county court shall have original jurisdiction to try all causes at the present time within the jurisdiction of the county court and justices' courts, unless or until otherwise provided by law. (If there is no court of county-wide jurisdiction, here define extent of county court's jurisdiction.)

*Section 60.* The chief justice and the justices of the supreme court shall be appointed by the governor for a term of ten years, subject to the consent of a majority of the legislature. The judges of the district court and the county court shall be appointed by the governor for a term of ten years.<sup>2</sup>

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<sup>2</sup> The committee does not believe that the mode of selection of judges should be changed in those states where they are now appointed by the governor for a life term. In such states the existing system is giving satisfaction. However, traditions elsewhere are strongly against a judiciary appointed for life.

In most of our states it is possible to make a vast improvement over present methods without adopting the full-life tenure if conditions do not permit.

The Wisconsin system, by which vacancies are filled by the governor

*Section 61.* The chief justice shall be an additional justice of the supreme court and presiding justice thereof. He may sit in any division thereof. He shall preside over meetings of the judicial council, and shall be executive head of the general court of justice, exercising such powers as are herein expressed or may be hereafter conferred by rules, not in conflict herewith, made by the judicial council. It shall be the duty of the chief justice to organize the general court. The chief justice shall cause to be published an annual report which shall include sta-

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until a successor is elected, has much to commend it, because the governor customarily appoints the man recommended by the bar association after a bar primary has been held. When election comes around, it is the custom to reelect the judge so appointed. A judge is, therefore, usually reelected until he dies or resigns. Practically all judges were originally appointed by the governor upon the advice of the bar.

There is one drawback, however, to the practice of reelecting the sitting judge for the sake of upholding a tradition, in that it inevitably results in retaining in office some judges who do not give entire satisfaction. For instance, the removal of a judge incapacitated by advancing years is made extremely difficult. When the situation becomes intolerable the legislature creates special courts which virtually supplant the older court served by the undesirable judge. There are thirty or more specially created courts in Wisconsin outside of Milwaukee.

With this exception, the Wisconsin system of separate elections for judges and the nonpartisan ballot work well in that state. The committee, however, is not prepared to recommend the nonpartisan ballot for the election of judges.

Another method is that there should be on the ballot a candidate designated as the "governor's choice." He would be the governor's designee for the office, and would possess an advantage thereby.

Another method, which follows that proposed by the Louisiana Bar Association to the last constitutional convention of that state, is to have the governor fill vacancies, and at the next general election the people vote on whether the appointee shall be continued in office. At stated intervals, say ten years, each judge would "run against his record," that is, the people would vote whether to continue the incumbent in office. The number of years for which the judge had served would be stated on the ballot. If the people refused to continue him in office, the governor would fill the vacancy, as in other cases.

A final method has the endorsement of the American Judicature Society. It provides for a chief justice elected by the people who would appoint justices and judges from an eligible list presented by the judicial council. After a probationary term the people would vote whether to retain or remove the chief justice's appointee. The chief executive officer of the court would be clearly responsible in the first instance for the appointment, but its tenure would depend on the people.

tistics regarding the business done by each department of the general court, and the state of the dockets at the close of the year.

*Section 62.* Subject to alteration by the judicial council or by law, the state shall be divided into the following districts, namely:

First District: The first district shall comprise (and so forth).

*Section 63.* The district court judges shall be assigned by the chief justice to the several districts. As nearly as may be, each judge shall be assigned to a district containing all or a part of the district (or circuit) where he served regularly as a judge prior to the adoption of this constitution; but every such judge shall be eligible to sit under temporary assignment in any other district. Each district shall have a presiding justice who shall be appointed by the chief justice from among the judges over whom he is to preside, to serve as such until the end of the term of the chief justice, or until his retirement, or his removal as presiding justice by the judicial council. The presiding justice in each district shall have control over the calendars in the district in county courts in his district and the assignment of judges, subject to rules to be made by the judicial council.

*Section 64.* There shall be a judicial council, to consist of the chief justice, the presiding justices of the several districts, and two (or one) justices of the supreme court and two county court judges to be assigned for one year by the chief justice. The judicial council shall meet at least once in each quarter, at a time and place to be designated by the chief justice.

*Section 65.* The judicial council, in addition to other powers herein conferred upon it, or hereafter conferred by law, shall have power to make, alter and amend all rules relating to pleading, practice and procedure in the general court, and to prescribe generally by rules of court and duties and jurisdiction of masters and magistrates; also to make all rules and regulations respecting the duties and the business of the clerk of the general court and his subordinates, and all ministerial officers of the general court and all its departments, divisions and

branches. After this constitution has been in effect for four years, the legislature shall have power to repeal, alter, amend or supplement any rule of pleading, practice or procedure, by a law limited to that specific purpose. The judicial council may reduce the number of justices of the peace in any county as vacancies occur.

*Section 66.* The rules in force at the time the general court shall be established, regulating pleading, practice and procedure in the courts consolidated by this constitution, which are not inconsistent herewith, whether the same be effective by reason of any or all acts of the legislature, or otherwise, are hereby repealed as statutes, and are constituted and declared to be operative as the first rules of court for the appropriate departments of the general court, but subject to the power of the judicial council to make, alter and amend such rules.

*Section 67.* There shall be selected, by nomination of the chief justice and confirmation of the judicial council, a clerk of the general court of justice, whose duties shall be prescribed by the judicial council. The supreme court reporter and clerks of all existing courts at the time of the establishment of the general court, shall continue in office until their terms expire or are terminated according to law, and shall be subject to the general supervision of the clerk of the general court. As vacancies occur in the offices of such clerks and supreme court reporter the places shall be filled in the manner provided above for the selection of the clerks of the general court, and the persons so selected shall hold for such terms and receive such salaries as the judicial council shall direct.

*Section 68.* Meetings of the judges of the supreme court and meetings of the district and county judges of the several districts shall be held separately at least once in each quarter, at times and places to be designated by the presiding justices. The chief justice shall be notified of all department and district meetings, and shall, in his discretion, attend, preside, and take part in such meetings. The judges of all departments shall meet together and in departments once in each year, at a time and place to be designated by the chief justice. At all such meetings the judges shall receive and investigate, or



cause to be investigated, all complaints pertaining to the operation of the courts in which they sit, and the officers thereof, and shall take such steps in reference thereto as they may deem necessary and proper. The judges shall have power at any meeting, and it shall be their duty, to recommend to the judicial council all such rules and regulations for the proper administration of justice as to them may seem expedient.

*Section 69.* The legislature may, upon due notice given and opportunity for defense, remove or retire from office any judge, upon the concurrence of two-thirds of all the members elected.

*Section 70.* All remuneration paid for the services of judges and court officials provided for under this constitution shall be paid by an appropriation by the legislature, and shall be reckoned as part of the expense of the judicial establishment under this constitution. The legislature may by law provide for the apportionment among the several counties of the state of the expense of the maintenance of the general court so far as the same may exceed the revenues received therefrom.

*Section 71.* Subject to alteration under rules made by the judicial council, the fees taxed shall be such as were at the establishment of the general court provided by law. All such fees and all masters' fees shall be paid to the clerk of the general court. All fines collected shall be paid to the clerk. All fees, costs and fines paid to the clerk shall be accounted for by him monthly and paid to the state treasurer.

#### SUFFRAGE AND ELECTIONS

*Section 72.* Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year preceding the election, and of the county, township and ward (or precinct or election district) in which he resides, such time as may be provided by law, shall have the qualification of an elector. (*Follows Ohio Const., Article 5, Section 1.*)

*Section 73.* The legislature shall provide by law a system by which electors absent from their voting residence on election day shall not be denied the privilege of voting.

*Section 74.* For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or

to have lost it by reason of his absence while in the service of the United States, of the state government, or of a municipality of the state, or while navigating the waters of the United States or the high seas, or while a student of an institution, or while kept in an institution at public expense, or while confined in prison. The voting residence of a married woman shall be where she actually resides, and shall not be determined by the residence of her husband.

An American citizen otherwise qualified to vote shall not be deemed to have lost her voting privilege by marriage to an alien.

#### TAXATION AND FINANCE

*Section 75.* The power of taxation shall never be surrendered, suspended, or contracted away.

*Section 76.* The credit of the state or any civil division thereof shall not in any manner be given or loaned to or in aid of any individual, association or corporation.

*Section 77.* No debt shall be contracted by or in behalf of this state unless such debt shall be authorized by law for some single work or object to be distinctly specified therein; and no such law shall, except for the purpose of repelling invasion, suppressing insurrection, defending the state in war, or redeeming the present outstanding indebtedness of the state, take effect until it shall at a general election have been submitted to the people and have received a majority of all votes cast for and against it at such election; except that the state may by law borrow money to meet appropriations made for the next ensuing fiscal year (or biennium), in anticipation of the collection of taxes and revenues of such fiscal year (or biennium), and within fifty per centum of the amount of such anticipated taxes and revenues, but all loans contracted in anticipation of taxes and revenues shall be paid within one year.

#### MUNICIPAL CORPORATIONS

*Section 78.* Provision shall be made by a general law for the incorporation of cities and villages; and by a general law for the organization and government of cities and villages which do

not adopt laws or charters in accordance with the provisions of Sections 79 and 80 of this constitution.

*Section 79.* Laws may be enacted affecting the organization and government of cities and villages, which shall become effective in any city or village only when submitted to the electors thereof and approved by a majority of those voting thereon.

*Section 80.* Any city may frame and adopt a charter for its own government in the following manner: The legislative authority of the city may, by a two-thirds vote of its members, and upon the petition of ten per cent of the qualified electors, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise, at a special election to be called and held within the time aforesaid; the ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation.

Such candidates shall be nominated by petition, which shall be signed by not less than two per cent of the qualified electors, and be filed with the election authorities at least thirty days before such election; provided, that in no case shall the signatures of more than one thousand (1,000) qualified electors be required for the nomination of any candidate. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving the highest number of votes or if the legislative authority of the state provides by general law for the election of such commissioners by means of a preferential ballot or proportional representation, or both, then the fifteen chosen in the manner required by such general law shall constitute the charter commission, and shall proceed to frame a charter.

Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter commission, which shall be at least

thirty days subsequent to its completion and distribution among the electors, and not more than one year from the date of the election of the charter commission. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provision for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city not less than thirty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon shall become the organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are in conflict herewith. Within thirty days after its approval the election authorities shall certify a copy of such charter to the secretary of the legislature, who shall file the same as a public record in his office, and the same shall be published as an appendix to the session laws enacted by the legislature.

*Section 81.* Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided in Section 80 for framing and adopting a charter. Amendments may also be proposed by two-thirds of the legislative authority of the city, or by petition of ten per cent of the electors; and any such amendment, after due public hearing before such legislative authority, shall be submitted at a regular or special election, as provided for the submission of the question of choosing a charter commission. Copies of all proposed amendments shall be sent to the qualified electors. Any such amendment approved by a majority of the electors voting thereon shall become a part of the charter of the city at the time fixed in the amendment, and shall be certified to and filed and published by the secretary of the legislature, as in the case of a charter.

*Section 82.* Each city shall have, and is hereby granted the authority to exercise, all powers relating to municipal affairs; and no enumeration of powers in this constitution, or any law, shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not be

deemed to limit or restrict the power of the legislature in matters relating to state affairs, to enact general laws applicable alike to all cities of the state.

The following shall be deemed to be a part of the powers conferred upon cities by this section :

(a) To levy, assess and collect taxes, and to borrow money, within the limits prescribed by general laws; and to levy and collect special assessments for benefits conferred;

(b) To furnish all local public services; to purchase, hire, construct, own, maintain, and operate or lease local public utilities; to acquire, by condemnation or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and regulate the exercise thereof;

(c) To make local public improvements and to acquire, by condemnation or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over that needed for any such improvement, and to sell or lease such excess property, with restrictions, in order to protect and preserve the improvement;

(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the revenues thereof, or of both, including in the case of a public utility, if deemed desirable by the city, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility;

(e) To organize and administer public schools and libraries, subject to the general laws establishing a standard of education for the state;

(f) To adopt and enforce within their limits, local police, sanitary and other similar regulations not in conflict with general laws.

*Section 83.* General laws may be passed requiring reports from cities as to their transactions and financial condition, and providing for the examination by state officials of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

*Section 84.* All elections and submissions of questions provided for in this article, or in any charter or law adopted in accordance herewith, shall be conducted by the election authorities provided by general law.

### COUNTIES

*Section 85.* No new county shall be created and no existing county shall be subdivided unless the question is submitted to the duly enrolled or registered voters of the district or districts affected, at a regular or at a specially called election, and is approved by a majority of such voters voting thereon in the district or districts affected.

*Section 86.* The general powers and duties of county government shall be defined by general law, applicable to all counties, and optional plans for the organization of county government may be provided by law, to be effective in any county when submitted to the legal voters thereof and approved by a majority of those voting thereon.

*Section 87.* Any county shall have the power to frame, adopt and amend a charter for its government and to amend any existing law relating to its local organization, such charters and amendments to take effect when submitted to the legal voters of the county and approved by a majority of those voting thereon. The manner of exercising the powers herein granted may be regulated by general law.

*Section 88.* Any county with a population of over ——— may be authorized by law to provide in its charter for a consolidated system of municipal government, providing for the powers and duties of county, city and other municipal authorities within the county and abolishing all officers whose powers and duties are otherwise provided for.

### THE CIVIL SERVICE

*Section 89.* Appointments and promotions in the civil service of this state and of all civil divisions thereof, including counties, cities and villages, shall be made according to fitness, to be determined, so far as practicable, by examination, which, so far as practicable, shall be competitive.

## PUBLIC WELFARE

*Section 90.* The maintenance and distribution, at reasonable rates, of a sufficient supply of food or other common necessities of life, and the providing of shelter, are public functions, and the state and municipalities therein may take and provide the same for their inhabitants in such manner as the legislature shall determine. (*Follows Mass. Const. Amend., Art. XLVII.*)

*Section 91.* The conservation, development and utilization of the agricultural, mineral, forest, water and other natural resources of the state, are public uses, and the legislature shall have power to provide for the taking, upon payment of just compensation therefor, of lands and easements, or interests therein, including water and mineral rights, for the purpose of securing and promoting the proper conservation, development, utilization and control thereof and to enact legislation necessary or expedient therefor. (*Mass. Const. Amend., Art. XLIX, 1918.*)

*Section 92.* Advertising on public ways, in public places and on private property, within public view, may be regulated and restricted by law. (*Mass. Const. Amend., Art. L, 1918.*)

*Section 93.* The state, or any municipality thereof, appropriating or otherwise acquiring property for public use, may, in furtherance of such public use, appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or acquired; and such bonds, when made a lien only against the property so appropriated or acquired, shall not be subject to the restrictions or limitations of amount of indebtedness of the state or any municipality prescribed by this constitution or by law. (*Follows Ohio Const., Article XVIII, Section 10.*)

## AMENDMENTS

*Section 94.* Amendments to this constitution may be proposed in the legislature at any regular or special session, and if

the same shall be agreed to by a majority of all the members, such proposed amendments shall be entered on the journal, with the yeas and nays. Such amendments shall be submitted to a vote of the people by the secretary of the legislature at the first regular or state special election, held not less than three months after the date of adjournment. Amendments so proposed shall be submitted on separate, nonpartisan ballots, and any amendment approved by a majority of the qualified voters voting on that amendment shall be declared adopted, provided that at least twenty per cent of those voting at the election be recorded in the affirmative. Such amendment shall be published by the governor, becoming effective as part of the constitution on the date of publication.

*Section 95.* Amendments to the constitution may be proposed by petition of the qualified voters of this state. Such petition shall contain the full text of the measure proposed, and shall be signed by —— qualified voters, provided that in at least half of the counties of the state a number of qualified voters equal to five per cent of the total votes cast for governor at that last election sign the petition for the submission of the amendment. The petition shall be filed with the secretary of the legislature, who shall canvass the same to ascertain whether the petition has been signed in accordance with the above requirements, and shall then publish the proposed amendment or amendments and submit them to the vote of the people in the manner prescribed in Section 94, except that the date of the filing of the petition shall take the place of the date of adjournment of the legislature prescribed therein. Such amendment or amendments shall become effective in the manner prescribed in Section 94, provided that at least twenty per cent of those voting at the election vote in the affirmative.

*Section 96.* The legislature, by vote of a majority of all the members entered by yeas and nays on the journal, may at any regular or special session call for a constitutional convention to amend or revise the constitution. The question, "Shall there be a convention to amend or revise the constitution?" shall be submitted to the qualified voters of the state in the manner prescribed in Section 94 for amendments proposed by the legisla-



ture, and if affirmed by a majority of the voters voting on said question, provided that at least twenty per cent of those voting at the election vote in the affirmative, the legislature shall at its next session provide by law for calling the same. Such convention shall assemble one month after the election of delegates. Delegates to the convention shall be chosen at a special election to be held not less than three months nor more than six months after approval of the proposition to call a convention. They shall be elected in the same manner as members of the legislature, by the system of proportional representation, with a single transferable vote, except that the election of delegates shall be on a nonpartisan ballot. As many delegates shall be elected from each legislative district as there are representatives in the legislature. The amendments or revision of the constitution shall be submitted to a vote of the people at a special election not less than three months nor more than six months after the adjournment of the convention, and if approved by a majority of the qualified voters voting thereon shall be published by the governor and become effective from the date of publication.

*Section 97.* The question, "Shall there be a convention to amend or revise the constitution?" may be proposed by petition. Such petition shall be signed by ——— qualified voters, provided that in at least half of the counties of the state a number of qualified voters equal to five per cent of the total votes cast for governor at the last election sign the petition for a convention. The petition shall be filed with the secretary of the legislature, who shall canvass the same to ascertain whether it has been signed in accordance with the above requirements, and shall then publish the question in the manner prescribed in Section 94, except that the date of filing the petition shall take the place of the date of adjournment of the legislature prescribed therein. If the question be affirmed by a majority of the qualified voters voting thereon, provided that at least twenty per cent of those voting at the election vote in the affirmative the convention shall be held in accordance with the provisions of Section 96.

*Section 98.* The provisions of the constitution affecting its amendment or revision shall be self-executing, but legislation may be adopted to facilitate their operation. If conflicting measures submitted to the people at the same election shall be approved, the one receiving the highest number of affirmative votes shall thereby become law as to all conflicting provisions.

# EXPLANATION AND DEFENSE OF MODEL STATE CONSTITUTION

## I. THE LEGISLATURE

*By H. W. Dodds*

The provisions of the model constitution with respect to the legislature will seem radical to those familiar only with the traditional organization and procedure of American legislative bodies. But from the standpoint of successful experience elsewhere, the changes proposed are not extreme. They are designed to secure for American practice the certain recognized advantages enjoyed by other English speaking people and to retain and develop those features which are working well in the United States.

Our state legislatures these days come in for a great deal of public criticism. Their prestige is undeservedly low. "The legislature has adjourned. Praise God from whom all blessings flow!" is a sentiment which finds too ready approval from us all. The public resents the terrific volume of unsystematic and illy-drafted statutes which issue from each legislative session; it feels offended at the haste and congestion which mark the closing days of the session; it resents a legislature palpably bossed but it is also impatient when the houses drift aimlessly without a boss. Those who visit the legislature are shocked by the haphazard manner in which the public business is conducted, so much at variance with their notions of the dignity which should clothe statecraft.

### *Legislature a Body of Laymen*

The fundamental causes of this low prestige is found in the failure of the legislature to adapt its organization and methods to modern conditions. The members are amateurs in legislation. The more representative they are of all the interests in

the state, the more amateurish they are. But the problems with which they are faced today are highly complicated. No one person can possibly be expert in all or many of them, and yet as far as legislative methods are concerned they are being handled in the manner of the eighteenth century. This means that the legislatures are relying too much on their undirected and unaided judgment in both the preparation and disposition of extremely involved subject matter. They have not developed expert assistance on the one hand, nor responsible, capable leadership on the other. For this reason their work seems without purpose or order.

The model constitution proceeds upon the basis that the legislature is and should remain a body of laymen representative of all interests and regions, and meeting primarily to criticize and approve or reject measures brought before them by experts. A large number of these measures will have to do with the work of the administrative departments. For example, appropriations, which form the major share of the ordinary business of legislation, have to do with administration almost solely. It is therefore important that close relations be established between the legislative and executive departments. It is also important that the legislature develop within itself agencies which will enable it to gather and compile the information necessary for intelligent judgment upon the manifold problems facing it. The legislature at its best will be a body of amateurs acting upon information prepared for it by experts.

The salient recommendations embodied in the model constitution can be reduced to three: (1) the abolition of the bicameral system and the adoption of a unicameral legislature; (2) the establishment of a legislative council to collect information and submit measures for action by the legislature; and (3) closer relationship and greater harmony between the governor and the legislature.

### *A Single Chamber Proposed*

The committee believes that a single body, chosen by proportional representation and not too large in number, will be at once more representative and efficient than the present two-chamber

system. The old arguments for two houses claim that they are more representative and more deliberative than a single body can be. But state senates are now chosen in the same manner as state assemblies. The senatorial district may be larger but the qualifications and weight of individual voters are the same in both districts. They represent the same people in the same way as the lower houses do. As long as European nations accepted an aristocracy of higher degree than the multitude there was a reason for an upper chamber. But the many no longer concede special privileges to the few and the upper house, although perhaps retained in law, has abroad been rendered almost impotent in fact. The state senates, likewise, are not now regarded as rational checks upon legislation. Doubtless they increase the effort necessary to pass legislation just as a rough road impedes the passage of an automobile, but mere obstruction is not a virtue. Intelligent obstruction may be, but the upper house rarely renders such obstruction because it is merely a pocket edition of the lower house.

A division of power between the two houses leads to a division of responsibility, to political trades, to "passing the buck." Measures often pass one house with the understanding that they will be killed in the other and from such transactions the people get a false impression as to the checking influence of the bicameral system. As former Governor Hodges of Kansas said:

About the only purpose I have ever been able to see for the two-house system is that it enables a legislator to fool his constituents by getting a measure demanded or promised them through his branch of the legislature, and then using every effort to have it killed in the other branch.

A distinct advantage of the single-chamber system is the encouragement it affords to the development of public, responsible leadership within the legislature, and to closer coöperation between the governor and the legislature. We are all familiar with the situation which arises when the two houses are of different political complexions, or when the governor and a branch of the legislature are at odds. And yet the governor by reason of his grip on the administration and his knowledge of the working

of law is naturally the one person to whom the legislature should turn for enlightenment. He is also the one person whose work the legislature should be able to inquire into with the greatest ease. The governor should be closer to the legislature both as a leader and as a servant, but this can only come about if there is real centralization of authority within a well organized and smoothly running body. The voters can keep track of such a legislature. We mistrust our present legislatures because they so easily slip out of our grasp.

### *A Legislative Council*

Sections 29 to 32 inclusive provide for a legislative council, an innovation in American practice. It is to consist of the governor and seven members of the legislature chosen by vote of the members under the system of proportional representation. It is assumed that the council shall be a continuous body, gathering material, preparing the legislative program, and drafting measures for introduction in the legislature at the next session. The council will naturally be selected from the leaders in the legislature. Their political influence will be strengthened by membership on the council through the command of the subject matter which their study as members of the council will give them. With the assistance of adequate staff agencies they will be able to undertake investigations such as are frequently conducted at present by *ad interim* committees. Membership on the council will be a full time job and its effectiveness will greatly exceed that of the present special or standing committees of investigation. In so far as a legislative program is concerned, the council should render a service to the legislature not unlike that now provided by the cabinet under the parliamentary form of government.

The legislature is entitled to this service. At present the members are confronted with a huge mass of disorderly material, conflicting information and bewildering pressure from constituents and lobbyists. From this they are expected to weave a beautiful pattern of graceful legislation. It is of course a super-human task and the members should long ago have struck. No private business would expect its board of directors to act with

such inadequate staff assistance. A representative legislature is perfectly competent to determine state policy if the material upon which such policy rests is presented to it in proper form. But to turn amateurs adrift with no aid or advice, except that rendered by lobbyists, is the essence of cruelty.

Of course, the various administrative agencies at present render invaluable assistance in the framing and passage of bills related to their departments of work and it is expected that such assistance will be continued. But it is inherently help from the outside and is always accepted with a measure of suspicion. The more harmonious the relations between executive and legislature, the better will the legislative council function.

The legislative council, through its continually being on the job and by means of its special facilities for investigation, will also render important service as a critic of the administration. In this it will differ from the cabinet in other countries. Since it will contain representatives of all parties in proportion to their strength we may expect from it much helpful minority criticism. Our administration suffers by the absence of a well-informed minority review of its acts. His Majesty's Opposition is as useful as High Majesty's Government, but we have not had the advantage of it in our state governments. The minority, not having the means for intelligent examination of the inner workings of the administration, has had to rely upon hearsay and to resort to misinformed and oftentimes irrelevant criticism. We should, therefore, expect the legislative council to improve the legislature's understanding of administration, to make available to the legislature the full measure of the administration's experience and special knowledge, and to increase the responsibility of the executive to the people through a closer examination of his work.

As has already been intimated, the crying fault in legislative practice today is the absence of competent leadership. Our legislatures have had leaders in the past to be sure, but they have not been responsible leaders. What we need are leaders, recognized by the voters as such, whom we can hold responsible at the polls. How can party responsibility, which everyone admits is desirable, be secured unless there are leaders in the legislature

who publicly accept the obligations of leadership and who can be turned out by the voters if their leadership proves unsatisfactory?

The framers of our early constitutions were so eager to remove the legislature from the domination of the executive through the separation of powers that the problem of how the members would be guided seems never to have arisen in their minds. Yet it has been the absence of responsible and definite direction within the legislature which has necessitated the development of leaders outside who, hidden from public view, have turned the opportunity into a source of private gain. Our state legislators are but human beings who usually have had little legislative experience and are generally as amenable to good leadership as bad. But led they must be, and the boss has filled a real need.

The legislative council is designed to supplant the boss as a legislative leader. Not that the council will not be composed of leading politicians who now hold and will continue to hold places on important committees as well as other key positions. We should expect the members of the council to be chosen from those who have already gained great influence in the legislature. But as members of the council they will appear in a new form to the voters. To the average voter they will be the legislature personified, and the party will have to accept the credit or blame for their leadership.

### *Closer Relations between Governor and Legislature*

The third significant feature of the model constitution lies in the new relationship between the governor and the legislature. Our constitutions are constructed on the theory that the governor should be a check upon the legislature and that the legislature should be a check upon the governor. To the framers of our first constitutions, coöperation between the two departments would have seemed a conspiracy.

The theory of checks and balances was inspired by the fear that the nature of government is to oppress the people. Government was viewed as a necessary evil to be kept as much as possible in a condition of inertia. But this fear of oppression



exists no longer and now we look to government as the organ of society by which our common problems are worked out. We want a government that can act quickly with a minimum of friction. This means that there must be coördination between the parts, that the executive and legislative departments must work in harmony. Now that the people are coming more and more to consider the governor as a leader in legislation, it is important that he be given proper opportunity to fulfill the party pledges.

The model constitution provides that the governor shall be a member of the legislative council. This will assist the council in keeping track of the governor and at the same time give the governor every chance to be heard by the council. Section 47 entitles the governor and his department heads to seats in the legislature. Section 49 provides for the governor's appearance before the legislature and its committees, to answer questions with respect to the budget. If this practice is adopted the governor at once becomes more responsible and more influential. When the two departments are separated by animosities, by prejudice or merely by deep-seated tradition, the public business suffers.

It is not unusual to find the governor and legislature at loggerheads. In such cases our present system provides no method by which the argument can be decided; and the wheels of government are held up until one or the other goes out of office. Under the parliamentary system a government which did not have the confidence of the legislature would quickly fall and the difficulty would be settled. But we do not have the parliamentary system nor is it the intention of the model constitution to introduce it.

Section 27, however, does provide a method whereby the governor or the legislature may refer a disputed question to the people in order that the voters may decide which they will support. If the governor believes that the people desire to have a measure passed which the legislature defeated, he may order that it be submitted to referendum, provided that one-third of the members of the legislature voted for it when it was up for passage in that body. Conversely, if a majority of the legisla-

ture favor a measure which the governor has vetoed but the two-thirds vote necessary to pass it over his veto cannot be mustered, the legislature may refer the proposition to the people. Under such a system there will be no reason for a legislative deadlock on an important subject.

Brief reference should be made to one other proposal incorporated in Section 23. Legislatures suffer much from the inefficiency of their employees. The reasons for their appointment are usually political, and they are not organized under any administrative head to enforce efficiency or coördinate their work. The model constitution contemplates a legislative secretary who shall appoint and supervise the employees of the legislature and "have charge of all services incidental to the work of legislation." The improvement in legislative efficiency which could result from the modernization of the legislature's staff administration would be considerable.

## II. THE EXECUTIVE

*By John A. Fairlie*

In American state governments, the executive has come to be organized in a fashion which almost defies analysis, and offers a striking contrast to the executive organization in the national government and in that of all other countries, and also to that in many American cities.

In most European and other foreign countries, there is a single titular executive, with extensive formal powers. But in the operation of the government the executive powers are exercised by a cabinet of administrative officials, acting collectively, but generally with a prime minister who has a large and often a dominating influence. In Switzerland, the executive council is vested with the executive powers, and the president of the confederation is merely the chairman of the council.

The United States Constitution vests the executive power in the President, with a large field of personal authority and control, limited, however, by the power of the senate over appointments and treaties; and there has also developed an extra-legal advisory cabinet composed of the heads of the principal executive

departments. The internal organization of these departments and the recent development of many boards and commissions outside of the executive departments weakens the President's effective control; but the constitutional principle of concentrated responsibility is clearly established.

American municipal government for many years exhibited the same characteristics of executive disorganization which still characterize the state executive; and these still persist to a considerable degree in many cities. But to a large extent municipal administration is now more effectively organized, either under the mayor or a city manager, or under a small commission of from three to seven members.

But the state executive remains in the main a loose aggregation of unrelated offices, under no effective direction or control. The arrangements in force represent no consistent or coherent system; but are the haphazard results of more than a century of unconscious adaptation, resulting from a variety of conflicting ideals and principles, which have never been correlated. They have sometimes been referred to as a system of distributed executive powers; but no serious student of political organization has ever found any definite plan in the methods in force, or has undertaken to uphold any such plan of distribution. It represents neither the single executive, nor the collective executive, nor any intermediate type.

The factors which explain the present situation may be briefly summarized: In the first place, opposition to the appointed colonial governors led to distrust of concentrated executive power; and the early state constitutions weakened the executive and placed it largely under the control of the legislature. But the defects of legislative control and the increasing tide of democracy led to the direct popular election of most of the older executive offices. Since about 1850, there has been a steady development of the governor's power, with the development of state administration; but the older offices remain elective; while in most states the multitude and variety of appointive officials and boards and the lack of any systematic organization prevents the governor from establishing an effective control even over the appointive officials.

In a few states, beginning with Illinois in 1917, there has recently been established a more systematic organization of state administration, covering the appointive positions under the governor. But these changes have been made by statute; and have not been able to include the elective state officials provided for in the state constitution. Any thorough reorganization of the state executive, therefore, requires important changes in the constitutional provisions relating to that branch of the government.

### *The Governor and the Legislature*

The provisions of the "Model State Constitution" relating to the executive are based on the principle of concentrated executive power, as in the Constitution of the United States. The executive power of the state is vested in a governor, to be elected by popular vote and to hold office for a term of four years. He is to appoint and may remove the heads of all executive departments, and all other officers and employees in the executive service are to be appointed by the governor or by the heads of executive departments as may be provided by law.

It has been proposed by some that the separation of executive and legislative powers should be entirely abandoned; and that the governor should be elected by and directly responsible to the legislature. This would be in accordance with the cabinet system of European countries, and with the method of choosing the executive council in Switzerland, and also with the city-manager plan of municipal government. But, while there may be much to be said in favor of such a plan, it has seemed to the committee of the National Municipal League that for some time to come such a reversal of established American methods will not be approved. The governor has become much more than a ministerial officer to execute laws and policies. He is expected to develop and carry out plans of administrative policy, and to take the lead in proposing legislative measures. His election by the state at large gives him a broader outlook than many of the members of the legislature, who may be guided too much by the local views of their districts. In fact, election returns indicate that there is a larger popular interest in the election of

governor than in the election of members of the legislature. It, therefore, seems best to retain the direct election of the governor, as a feature of popular control of the government which is now effective.

At the same time, it is important to recognize that the governor and the legislature must work together if the state government is to operate harmoniously and successfully. The two should not be considered as occupying water-tight compartments with no direct connection except by formal documents. It is therefore proposed that: "The governor and heads of departments shall be entitled to seats in the legislature, may introduce bills therein and take part in the discussion of measures, but shall have no vote."

Such practices have frequently been urged for the President and members of his cabinet in Congress, among others by President Taft. A constitutional provision would mark the recognition and endorsement of existing practices, such as that of addresses to Congress and the state legislatures by the President and governors, and the active and necessary part taken by department heads, and sometimes by other officials in the formulation and advocacy of legislative measures. By the more open and public methods of communication, coöperation and harmony between the legislature and the executive should be made more easy.

It is more specifically provided that the governor shall submit at each regular session of the legislature a budget of proposed expenditures and anticipated revenues; and shall also introduce a general appropriation bill providing for all the proposed expenditures as set forth in the budget. Other features of the budget provisions will be discussed later in further articles on the model state constitution.

The veto power of the governor is retained, as in most of the existing state constitutions, subject to a two-thirds vote of the legislature; and the governor may also disapprove or reduce items in appropriations, subject also to the same two-thirds vote of the legislature.

A novel provision, to avoid deadlocks between the governor and the legislature, is that authorizing a referendum of the

people on measures vetoed by the governor, and (by order of the governor) on bills which fail of passage if at least one-third of the members vote in their favor. It is suggested that this procedure for securing a direct popular vote on such matters at issue may prove more satisfactory than the alternatives under the European cabinet system of the resignation of the cabinet or the dissolution of the legislature and a new general election.

### *Lieutenant-Governor Abolished*

The four years term for the governor corresponds to that of the President of the United States and to that of the governor in nearly half of the states. It is believed that such a period is needed to give a governor opportunity to develop and carry out his policies; while the biennial election of the legislature will make possible an effective public expression of disapproval of particular measures without leading to a general overturn of the administration.

Provisions have not been included in the sections drafted as to the qualifications for the governor, nor as to the usual powers of the governor to exercise executive power, to see that the laws are enforced, to act as commander-in-chief of the state military and naval forces, to require information from executive officers, and to exercise the power of pardon.

Such provisions are substantially similar in the state constitutions, and the variations of detail are of little importance. No changes of principle have been proposed with reference to these matters; and the usual provisions may be continued. The authority of the governor to supervise and direct other executive officers may, however, be made more definite. Nor have provisions as to impeachment and other methods of removal been as yet prepared by the committee. These may be included in later reports of its work.

In other matters, however, omissions of provisions commonly found in state constitutions have been for the definite purpose of carrying out the general principles of executive organization which are recommended. Thus, no provision is made for the election of a lieutenant-governor; but in case of vacancy or

disability of the governor the presiding officer of the legislature will act as governor for the remainder of the term. The election of an officer whose principal purpose is to fill a vacancy is an anomalous procedure, which has not been markedly successful, and the states which now have no lieutenant-governor do not seem to have suffered any serious results. Lieutenant-governors and vice-presidents of the United States have in many cases represented a different element or policy from the governor, and more continuity may be expected from an officer representing the majority in the legislature.

### *Governor to Appoint All Department Heads*

The appointment of all executive officers is proposed as an application of the short ballot principle, as well as the principle of concentrated executive authority. The election of a number of executive officers in addition to the governor fails to secure the results expected of increasing popular control; but on the contrary is today one of the most serious obstacles to popular control of the government. The long list of elective officers and the longer list of candidates impose an impossible task on the voter, beyond the capacity of the most intelligent who do not make a business of politics. The mechanical task of voting has been reduced by the party column and other devices on the ballot; but the results indicate clearly that the great mass of voters do not care to discriminate between candidates for the less important offices and vote on the basis of a party ticket. In effect the voters are disfranchised because they are required to vote too much. A responsible system of appointment should make more effective public opinion as registered in the election of the governor.

Moreover the duties of the subordinate officers now elective are not political, but executive or administrative in character; and call for qualifications of technical ability and experience which cannot well be determined by popular election. At least some of the officials now elected are less important than some of the positions now filled by appointment; and there is no logical basis of distinction between the appointive and elective places.

Where the elective state officers are chosen at the same time

on the same party ticket, some degree of harmony may be expected, on the basis of political principles or of party organization. But active coöperation between such officials is seldom found. They are apt to represent different, and sometimes antagonistic elements in the party; and even where there is no open hostility each elective officer is likely to feel and assert at times his independence of the governor. In some states elective state officers are *ex officio* members of certain state boards; but these have to do with limited and specific functions, and fall far short of constituting an executive council of general authority.

While no general principles have been stated on which to distinguish the officials now elective as a group from those appointed, for some positions there has been special opposition to transferring them from the elective to the appointive class. The election or appointment of the attorney-general was discussed at the constitutional conventions in New York state in 1867 and 1915. It was argued that the functions of this officer were to some degree political in nature. But it would seem that his duties to aid in the enforcement of the laws and to give legal advice to other state officers are essentially part of the executive power, and that these duties should be exercised by one in agreement with the chief executive who is constitutionally responsible for the execution of the laws. An attorney-general hostile to the governor could in large measure weaken his authority even over the officials he appoints. Indeed this situation has been recognized in New York, when by chance an attorney-general has been elected of another political party from the governor, the latter was authorized to employ special counsel. President Taft spoke before the committee of the New York convention in favor of the appointment of the attorney-general as follows:

Well, if you are going to have a lot of independent officers, who are running their own boats, paddling their own canoes, without respect to the head of the state, then of course you want a judicial officer to decide between them. But if you are running a government on the basis of a head man being responsible for what is done, and for the work being done in the most effective way, then what you want is a counsel. When you consult a lawyer, you don't



consult a judge. You consult a man who is with you, seeking to help you carry out the lawful purposes that you have. Therefore he ought to be your appointee. You select him. Now the chief executive is given an attorney-general to advise and represent him in all legal matters. I don't see why he shouldn't be appointed. It would be most awkward if he was not, in Washington, I can tell you that.<sup>1</sup>

### *Auditor Chosen by the Legislature*

The opinion is even more widely held that the state auditor or comptroller should be independent of the governor, on the ground that the duties of this officer are to act as a check on the expenditure of executive officials and keep them within the limits of the appropriations. This view also prevails in a few states where the auditor or comptroller is not elected, but is chosen by the legislature. On the other hand, in the United States national government the comptroller of the treasury and the auditors are appointed by the President, and are classed within the department of the treasury; and a similar arrangement is provided in a number of large cities, as in Chicago and Detroit.

If the auditor is to be independent of the governor, the practice in most of the states of electing this official at the same time as the governor is unsatisfactory. An auditor so elected is likely to be of the same party as the governor, and thus not to act as a wholly independent officer. Greater independence would be secured if the auditor were chosen by the legislature, or, if elected by popular vote, he should be elected at a different time than the governor.

But the practice of a supposedly independent officer who controls disbursements has been due to a confusion between the functions of accounting and auditing in American governments. The auditor or comptroller now acts to some extent both as accountant and auditor; but in fact there has been neither an adequate system of accounting, nor any effective independent audit of the accounts kept. In European governments, and in business corporations in the United States, the accounting service and the control over disbursements is a branch of the execu-

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<sup>1</sup> New York constitutional convention documents No. 11 (1915).

tive administration; while there is a subsequent audit of accounts at regular intervals by an outside agency. Thus in Great Britain the accounts are kept and current control of disbursements is exercised by the treasury; and the work of the comptroller and auditor-general is to make a critical examination of the completed financial accounts, methods and reports at the end of each fiscal year.

In some American states and cities, the need for a central executive control over expenditures and accounts has been recognized, to some extent, by such officers as the administrative auditor in Illinois or the commissioners of accounts in New York city, as agents of the governor or mayor, in addition to the popularly elected auditor or comptroller. But this plan, if adequately carried out, involves a duplicate system of accounts kept both by the executive department and by the auditor.

The same confusion of thought is shown in the recent proposal to make the United States comptroller of the treasury legally independent of the executive. This would make it necessary to establish a duplicate accounting system in the treasury department, unless the functions of the comptroller are strictly limited to that of auditing the accounts and reports.

It is the opinion of the National Municipal League Committee on State Government that there should be a central accounting service, with control over disbursements, in the executive branch of the state government, as one division of a department of finance. It should, however, be clearly made the duty of the legislature to provide for a regular independent audit of the financial accounts and reports after each fiscal period, in place of the spasmodic investigations which occasionally take place, based largely on political considerations.

### *The Executive Departments*

No constitutional provisions have been proposed for a definite and detailed plan of executive departments. In this respect the Constitution of the United States has been followed. This does not mean that the need for a thorough reorganization of the administrative arrangements in the states is not recognized. It is based on the belief that the details of administrative organiza-

tion should not be stereotyped in the state constitution, but should remain flexible, to be adjusted from time to time by legislation, to meet the needs of a developing political system.

The provisions in the present state constitutions for executive and administrative officers, which for the most part are survivals from the constitutions of the middle of the nineteenth century, have clearly proven inadequate for present conditions. Indeed they now form serious obstacles to the establishment of an effective administrative system. Proposed constitutional provisions for a more systematic arrangement, such as those presented in New York state, have been compromises, making only partial steps towards a satisfactory system; and there is danger that such partial reforms, embedded in the state constitution, will prove even more stubborn obstacles to further changes. Even the shorter provisions recently adopted in Massachusetts, providing for not more than twenty departments, give sanction to more than should be needed; and the legislation adopted under this provision falls far short of an effective organization.

It may be noted that most of the services of the United States national government, which greatly exceed those of any state, are organized in ten executive departments. And the still greater field of central administration in France is organized under a dozen ministries. There seems to be no need for any more in any American state; though it may be difficult to secure a reduction to this point in the near future.

The most comprehensive and successful plans of state administrative reorganization thus far adopted, such as those in Illinois, Nebraska and Idaho, have been accomplished by statutory legislation; and these might have gone further had it not been for the existing constitutional provisions. The policy followed has, therefore, been to omit from the proposed constitution all provisions relating to executive and administrative officers other than the governor.

The League's committee has also approved a constitutional provision for the merit system in the administrative service, substantially similar to the provisions in the New York and Ohio

constitutions, requiring competitive examinations so far as practicable for appointments. More definite provisions as to the organization of the civil service authority and the application of the constitutional principle should be made by legislation.

### III. THE BUDGET

*By A. E. Buck*

The need for a budget system in controlling the finances of state governments is now admitted by practically every one. In fact, forty-six states have already provided by statute or by constitutional amendment for the establishment of such a system. There is still, however, considerable difference of opinion upon the method by which a budget system should be established. The main questions at issue are two—the second being a corollary of the first. Should the state budget system be established by writing some provisions in the constitution? If so, what budgetary provisions should be written in the constitution?

So far, six states (California, Maryland, Massachusetts, Nebraska, Louisiana, and West Virginia) have written budget provisions in their constitutions. With most of the other states the budget system has been "on trial." Although a number of the states have amended their budget laws from time to time, or have passed new budget laws repealing the old laws, the experience of these states without exception has been such that not one has thought of abandoning the budget system. On the contrary, there is a growing opinion among the states that it has vindicated its usefulness to such an extent that it should be made a permanent procedure for state governments. In order to give it this permanency, it should be written in the state constitution. When this is done the system will not be susceptible to every political wind that blows; consequently, it will be much more effective as a method of conducting the state's business. The National Municipal League's committee was unanimously of the opinion that certain general provisions for a budget system should be included in the model state constitution.

When it came to drafting the budget provisions the members of the committee agreed that only the bare essentials of budgetary procedure should be incorporated in the model constitution and that all details should be left to a supporting statute. As a basis for determining these essentials the committee started with the principle that financial planning for the going concern of government is initially a function of the executive; therefore, the governor should be responsible for the preparation of the budget. But it was agreed that the application of this principle should not operate to curtail legislative power or control over the appropriation of public funds.

### *Governor to Direct the Preparation of the Budget*

The budget provisions of the model constitution presuppose a compact administration composed of about a dozen departments, the heads of which are directly responsible to the governor. Such an organization enables the governor to prepare a comprehensive budget plan and, what is even more important, it places him in a position where he can really carry out the plan when the legislature has authorized the appropriations.

It is assumed that the new governor will take office about two months before the opening of the regular session of the legislature. In fact, preceding sections of the model constitution provide that the governor will be inaugurated on the first Monday in December and that the legislature will meet on the first Monday in February. This provision remedies the situation existing in a number of states where the outgoing governor prepares the budget for the incoming governor and his administration. It allows sufficient time for the new governor to get the budget in shape for presentation to the legislature at the beginning of the session or not later than one week after the session begins. There is also an advantage in requiring the budget to be submitted to the legislature early in the session; it gives plenty of time for committee consideration and review by the members themselves.

It is presumed that the governor will have a permanent budget staff agency either in a department of finance or attached to his own office, which will work under his direction in the prepara-

tion of the budget and will be engaged in gathering budget information throughout the year. Such a staff seems quite essential to successful budget-making since budget needs are determined largely on the basis of past experience.

For the preparation of the budget the various departments, offices and agencies are required to furnish the governor such information in such form as he may require. This provision applies to the courts, the legislature and all agencies of whatever character requesting or receiving financial support from the state. It implies that the governor through his staff agency is to provide a budget classification and standard forms upon which the estimates are to be submitted. The time for submitting the estimates and definite responsibility for their preparation may be fixed by statute.

#### *Form of Budget Document Not Specified*

Nothing is specified as to the form and contents of the budget beyond the general statement that the document must set forth "a complete plan of proposed expenditures and anticipated revenues" for the next ensuing fiscal year. As yet the budget movement in this country is not old enough to have developed a standard form to be followed in making up a budget document. So far, different states have found it necessary to emphasize different features of the financial plan. Where detailed provisions on the form of the budget have to be written in the constitution, as is the case in Maryland, they have hindered rather than helped the making up of a concise and easily understood document. The development of the technique of properly presenting information in the budget document should not be hampered by constitutional provisions. Our budget experience up to this time indicates pretty clearly one thing: that the complete budget plan—all proposed expenditures and the means of financing them—should be and can be presented in a single-page statement, the remainder of the budget document to consist of supporting schedules to this statement. If the governor proposes expenditures in excess of the anticipated expendable resources of the state, this fact should be clearly shown; and it should then be the duty of the governor to recommend additional

means of meeting the proposed expenditures. Otherwise his budget plan will not be complete.

*Governor to Submit Appropriation and Revenue Bills to Legislature*

The governor, at the time of submitting the budget to the legislature, is required to introduce a general appropriation bill containing all the proposed expenditures set forth in the budget and likewise a bill or bills covering all recommendations in the budget for additional revenues or borrowings by which the proposed expenditures are to be met. There are three very good reasons for this provision. When bills to carry out the budget plan are submitted with the budget, the legislature has something concrete to refer to its committee and to set to work upon; otherwise the legislature may be inclined to regard the budget merely as an administrative report and for that reason give little attention to its recommendations. By this procedure the governor is given an opportunity to set up in the appropriation act whatever degree of itemization he thinks is necessary and to suggest the terms and conditions to be attached to the appropriations. Furthermore, if the governor proposes to expend more money than can be raised under the existing revenue laws, he should propose measures by which additional funds are to be raised; the legislature should not discuss and pass upon appropriations without considering, at the same time, the sources of income to meet them.

*Governor's Appropriation Bill Given Priority in the Legislature*

The legislature is required to pass upon the general appropriation bill and any emergency appropriations recommended by the governor before taking up any appropriation bills introduced by members of the legislature. This provision gives precedence to the budget program. It aims at bringing about early consideration of the budget plan by the legislature and at keeping the attention of the members of that body concentrated on the plan until it is finally acted upon. Emergency appropriations cannot be made for a longer period than the date when the general appropriation bill becomes effective.

*Legislature Not Limited in Its Action on Governor's Proposals*

The legislature is not limited in its action upon the general appropriation bill. It may amend this bill by increasing, decreasing, or striking out any of the items, or by adding new items. As a safeguard against ill-advised action on the part of the legislature either in changing the general appropriation bill or in passing special appropriation bills, the governor is given the power to veto, as a whole or in part, items in such bills. As a further check the legislature is not allowed to appropriate for any fiscal period in excess of the expendable resources of the state for that period.

Only the Maryland budget amendment and those amendments or laws which have been copied from it have placed restrictions upon the power of the legislature to increase the governor's budget proposals. Of the five states which adopted the Maryland provision, New Mexico and Nevada have eliminated it from their budget laws. Utah eliminated this provision at the 1923 session of the legislature. Indiana's proposed budget amendment (copied from Maryland) failed to pass the 1921 legislature a second time largely on account of this provision. West Virginia has the provision embodied in a constitutional amendment. The experience of both Maryland and West Virginia on this point has not been very satisfactory. In fact, an attempt was made to amend the budget section at the 1923 session of the West Virginia legislature.

It would seem that such a provision is practically unnecessary in a state government where the administrative organization centers responsibility in the governor, as is proposed under the model constitution. If the legislature should appropriate more money than is necessary to carry on the activities of the government, the governor can prevent the expenditure of it since he is in complete control of the activities. The only need, then, for such a provision is to catch the appropriations that may be made for local purposes, the expenditure of which is not administered by the governor. In such cases the governor has the right to exercise his veto power and consequently prevent the appropriation from becoming law unless it is repassed



by a two-thirds vote of the legislature, in which case the responsibility is clearly upon the legislature.

### *Legislative Procedure on the Budget*

The legislature, which is to be a unicameral body, is required to hold at least one open session in its consideration of the budget at which taxpayers and the general public may appear and be heard on any of the budget proposals. One-fifth of the members of the legislature may require the governor to appear before the legislative body to explain the budget, or it may require the governor or his designated representative to appear before any of the legislative committees. This procedure is designed to give a minority group in the legislature a chance to criticize the budget plan and by this method to interest and inform the general public. The governor may voluntarily appear before the legislature and discuss the budget. Under other provisions of the model constitution he and his department heads are given seats in the legislature, but without votes. It is presumed that the legislative procedure which is used will be such as to give full publicity to the consideration of the budget at all stages in its passage through the legislature. It is intended that all budget problems will be handled by a single committee. This will tend to preserve the unity of the budget plan and will avoid the bad practice in a number of states where five or six legislative committees work independently on different phases of the budget plan at the same time.

### *Indefinite and Continuing Appropriations Eliminated*

Finally, as a check against indefinite and continuing appropriations, it is provided that no money shall be paid out of the state treasury except in accordance with specific appropriations made by law, and that an appropriation shall not confer authority to incur obligations against it after the termination of the fiscal period to which it relates. This enables all accounts to be closed at the end of the fiscal period and a complete budget to be set up for the ensuing fiscal period. Appropriations for capital purposes which cannot be materialized within the fiscal period should lapse at the end of the period and new appro-

priations should be made for continuing the work. Indefinite and revenue appropriations should not be made, as neither can be properly controlled. All revenues should go into the state treasury and expenditures should be made only upon definite appropriations by the legislature. Continuing appropriations have recently been abolished by law or discontinued in practice by a number of the states. Wisconsin is the most notable example of a state that still retains a system of continuing appropriations.

#### IV. THE JUDICIARY

*By W. F. Dodd*

Unification is the keynote to the judiciary article of the model state constitution. In no state at present is a single organization with a single head responsible for results in the administration of justice. Increased population and increased complexity of social problems have necessarily brought about a larger judicial structure. This enlarged structure has been created primarily by increasing the number of judges and by establishing new courts. Each judge is to a large extent independent of other judges in the judicial system, and each court distinct from other courts. In a number of the larger communities, notably in Chicago, unified municipal courts have been created; but though Chicago has one unified court, there are five independent trial courts exercising civil authority over its territory, and their respective jurisdictions are confused and complex. There is no unity of judicial administration.

Unity of organization and a single responsibility are necessary if the courts are to do their work effectively under the complex conditions of modern life, and this result may be achieved without in any way sacrificing the independence of judgment of the individual judge in deciding specific cases presented to him. Ordinarily we think of problems of administration as involved only in the executive department of government. The administrative problem in the judicial system is equal in importance and in magnitude. In the executive department we have come to recognize the necessity of unity and

responsibility, and we are coming to recognize the same need for the judicial department.

### *A General Court of Justice*

The model state constitution proposes the establishment of a general court of justice as the single court for the state, with departments for the performance of all trial and appellate judicial functions throughout the state's territory. It proposes a permanent chief justice, to be the executive head of the general court of justice, and creates a judicial council representing all parts of the judicial system and having large powers. Meetings of the judges are to be held at frequent intervals to consider methods for the improvement of judicial administration. The chief justice is required to publish an annual report giving statistics regarding the business done by the several departments of the general court and an account of the state of the dockets of the several departments. The judicial council is vested with large power to make rules of pleading, practice and procedure. The clerks of courts are to be nominated by the chief justice and confirmed by the judicial council. It may be worth while to review briefly the reasons for each of the important changes in the judicial system of the states proposed by the model state constitution.

Enough has already been said to indicate the necessity for a single judicial organization with a responsible head. Only by such a plan can it be known who is chargeable with defects in the administration of justice, and only by such a plan can such defects be remedied. In almost any state at the present time our judicial system can be likened to a regiment of troops with each person in the regiment seeking to command it. The result is necessarily chaotic. We need to organize the regiment under a single command from the administrative standpoint, and through such command to make each member of the regiment more efficient and more useful.

We have chief justices of our highest state courts and of many other courts throughout this country, but it is too common to have the office of chief justice rotate annually from one member of the court to another. Under such a plan it is im-

possible to have real responsibility, or to develop a continuous policy of judicial administration. It is necessary in order to have an efficient judicial system that there be a chief justice at the head of the whole system, exercising authority over a relatively long period of time. Under the model state constitution there is such a chief justice with large executive powers.

But even greater powers are vested in a judicial council, composed of representatives of the several departments into which the state judicial system is divided. Frequent meetings of judges are provided for, and at these meetings each individual judge will have a means of expressing himself as to the proper conduct of the judicial system. The chief justice is vested with the authority to prepare and publish annual reports, and this is a function properly belonging in the single executive head of the system, rather than in the judicial council or in the meetings of judges. The collection and publication of judicial statistics are permanent tasks and are properly assigned to the permanent executive head of the judicial system.

### *Court Procedure*

The procedure of courts is now regulated in great detail by legislative act. This detailed legislative regulation makes it impossible to perform judicial work efficiently. Procedure in the adjudication of cases should be determined by the judicial department upon which must rest the primary responsibility for an efficient system. For this reason a large rulemaking power should be vested in the judicial department and under the model state constitution such authority is to be exercised by the judicial council.

The legislature must remain the policy-determining body of the state and should retain some control over the policy of the judicial procedure. The rules of private right are closely bound up with the rules of procedure through which these rights are to be administered. Although the judicial system should have authority in the first instance to determine the rules of pleading, practice and procedure, the legislative department should have some check upon this authority so that the procedural rules laid down by the court may not come into conflict with the

substantive rules established by the legislature. The legislature should not have authority to interfere with the details of the procedure of the courts, for the judicial system cannot be given full power to develop its own efficiency without such authority; but the legislative department should have authority at intervals to supersede, supplement or amend rules made by the judicial council, and should thus be able to maintain its position as the final legislative authority of the state. Without such final control in the legislative department there would be two coördinate legislative authorities in a state, and no method of settling conflicts between the two. The model constitution gives the judicial council four years within which to elaborate its rules without restriction, but provides a legislative control thereafter.

In order to obtain a unified and effective judicial system it is necessary that the clerks of courts be appointed by and be directly under the control of a single judicial system established for the state. This is provided for by the model state constitution. At present in most parts of our judicial system there are elective clerks, and the judges of the courts are largely dependent for a large portion of the necessary work of judicial administration upon officers who are independent of the judges and have no direct responsibility for the conduct of judicial work.

### *Not Judicial Despotism*

It may be urged that a judicial despotism will be set up if we establish a single judicial system for each state, with a chief justice of somewhat permanent tenure and with a judicial council vested with large rulemaking authority. As a matter of fact such a plan in no way sets up a despotism, but rather seeks through an orderly planning to establish an efficient judicial organization. At present no one person and no one court is responsible for results or for abuses in the judicial system. We now have the possibility of various petty despotisms, for judicial abuses are not easily discoverable and each judge is a possible despot subject only to the check of expensive appeals. A unified and responsible judicial system would be able at once

to detect abuses in that system, and any effort upon the part of the head of such a system to abuse his authority would be immediately discoverable and corrected through public criticism. Criticism within the judicial system itself is provided under the model state constitution through a judicial council and through frequent meetings of the judges.

State constitutions are not always easy to change and many steps may be taken toward a unified judicial system without constitutional change. Most of the state constitutions organize the judicial system in some detail, but others do not, and it is therefore possible to accomplish a good deal by legislation. In practically all of the states, even where constitutional provisions are detailed, it is possible to accomplish something toward a more efficient and a more unified judicial system without constitutional amendment. By legislation in Wisconsin the circuit judges are organized into a single body with power to require reports and to assign judges from one circuit to another. In this way many of the advantages of a single trial court are obtained. The Judicature Commission of Massachusetts in 1921 recommended the establishment by law of a judicial council to study continuously and as a whole the judicial organization and the judicial business of that state. Ohio and Oregon by legislation of 1923 created judicial councils with advisory and investigational powers regarding the operation of the judicial system.

### *Movement Already under Way*

The movement for judicial unification is well under way. The statutory enactments in Wisconsin, Ohio and Oregon just referred to are important steps in that movement. Statutes in a number of states have given the courts broad rulemaking power. The Louisiana constitution of 1921 takes long steps toward unification by vesting in the supreme court of that state powers of supervision over the judicial system and by giving the attorney-general of the state supervisory authority over local prosecuting attorneys.

The movement for a more unified and more effective executive organization has been going on for many years. It makes

steady progress, but it will require decades to achieve complete success. The movement for unified judicial organization began later and must also be a continuous one over a period of years. In order to accomplish certain things, constitutional changes will be necessary. Other results may be achieved by legislation. Much may be done by more effective coöperation among courts and judges, independently of either constitutional or statutory changes. It is important that opportunities be availed of wherever possible to take forward steps in the direction of a more coördinated and a more responsible judicial organization. The model state constitution seeks to set up the standard of a unified and efficient organization. It is not possible that this standard be reached at once. But wherever possible, by coöperation among existing courts, by statutory changes or by constitutional amendment, steps should be taken toward higher judicial efficiency.

## V. COUNTIES

*By Richard S. Childs*

The county is of all the units of government the most unprogressive and corrupt, the most neglected by citizen, press and reformer. It is the very citadel of political bossism. Reform waves and improvements in governmental structure have made machine rule precarious in cities, and state governments are the scenes of vast renovations, but county government is in structure as it was in stage-coach days when it was designed and in quality as it was in the days of Tweed. Deeds that would shock the modern city hall are still respectable in the county court house.

The county simply is not interesting—that explains the fact that citizen and press pay no attention, and there is no way of making them get excited about a thing that is not exciting, no way of making the citizenry of any countryside attend a poor show. It is no use arguing that they ought to take an interest in the contest for coroner or county clerk so that the best man may get the job and draw the salary! In the first place it isn't true—each citizen ought to have better business than attending

to his share of so small a matter—and secondly, they simply won't play the rôle assigned them anyway.

Recognition of this second phenomenon is the foundation of modern political science. The older school ignored such probabilities and assigned to the electorate endless duties in the form of long ballots of inconsequential nonpolitical offices, numerous elections and complex nominating machinery. The voters ignored the tasks thus assigned and allowed a few active and interested leaders to tie up candidates into neat bunches like asparagus, called tickets, to be voted by the bunch without examination of the individual stalks. Thereby those leaders acquired an irresponsible power of appointment, since it became all-important to a candidate to ingratiate himself with these leaders so that they might include him in the bunch. Thus the real ruling force of American politics became vested in certain private self-renewing political clubs known as the "machines," the "rings," the "party leaders," the "bosses."

Nowhere has this analysis been more completely accurate than in the county. The list of county offices comprises the least interesting and important within the gift of the people, so much so that in hundreds of rural counties some of these offices attract no candidates and remain unfilled term after term. The party bosses are undisturbed in their control and use the patronage and contracts undisguisedly for their own continuance in power. The county is the unit of bossism. Your state machine—look at it—is not a unit but a federation—of county leaders whose power at home is so secure that they affront the state chairman unafraid. The state ticket "recognizes" them in turn. The congressman runs his feet off for them. The city breaks away to try the city manager plan or a nonpartisan administration but from the secure fastness of the adjacent county government, the machine outstretches envious hands to discredit and embarrass such heterodoxy.

### *The County Legally Refractory*

The reformers' lack of attention to county government is explained sufficiently by the legal refractoriness of the problem. Until recently there was only one state (Nebraska) which did



not entwine the old county government structure inextricably into its constitution. To reconstruct meant passing a set of a dozen technical amendments and where was the state-wide interest that could be invoked in such a dull cause? And so, behind its technical defenses that made every endeavor at modernization unconstitutional, county government has remained the same in structure and almost the same in spirit as when it was first evolved a hundred years ago to provide primitive machinery of local justice for the farming and mill-village countryside of pre-railroad days!

Recently, however, the reformers have begun to get round to the county, the social workers approaching from the basis of an interest in the sickening backwardness of county institutions—its jails and asylums and hospitals, and the political reformers approaching from a victorious past in municipal government eager to apply here the principles they had found effective on earlier battlegrounds.

The program of the latter, based upon a philosophy and experience too large to be fully explained here, involves ousting bossism and the endless perversion of public service that it involves by radically clearing off this political ambush and establishing a simple open battlefield wherein that political amateur, the average voter, can see and fight.

The present form of county government could hardly have been more effectively designed to resist popular control. Most of the people of the United States live under the New York style of county government, consisting of a board of supervisors elected by towns and meeting for a day at long intervals to make appropriations which are spent by the other county offices over whom the board has no control. These other officers, the sheriff, county clerk, register, district attorney, superintendent of the poor, coroner, treasurer, comptroller, etc., are independently elected and sit serene on their little independent islands of authority, caring nothing for the tax rate since the board of supervisors carries the brunt of that and caring nothing for the supervisors except for the need of getting the money out of them once a year. The supervisors on their part can starve these executives without being blamed for the resultant condi-

tions in the jail or the poorhouse. It is not a government, it is a dozen governments loosely tied together. The only central guiding brain that can hopefully attempt to compel teamwork or correct failures is the county boss, or group of bosses, who gave the whole string of officers their beneficent nod of approval which made them the party candidates and brought them into the asparagus bunch and thus assumed their election. And this rigid form of government is applied uniformly and inflexibly to Cook county (Chicago), to the mountain wilderness of St. Lawrence county (New York), to desert counties in California as big as New Jersey, and to about two thousand other counties of every description without modification for over one hundred years!

### *A Better Form Possible*

A better form of government can be devised that will be easily comprehended and easily controlled by the rank and file of the people, meaning not any hundred per cent, to be sure, but a vastly larger percentage than the handful of unduly interested persons who now control county destinies. Further than that a mere form of government cannot hope to go, but it will be far enough to bring wholesale and wholesome improvement.

Such a form of government must have a "short ballot," *i.e.*, only a very few elective officers and those must be of a type and importance that will—actually will—enlist wide popular interest.

It must be a simple straightforward type of organization depending for its safety upon clear-cut single responsibility instead of on endless checks and balances and red tape.

And it would be best that the only elective officers be those with representative functions (as distinguished from executive) for the natural interest of the voters is in selecting "our kind" of man and that natural interest receives its fullest and best outlet if not tangled up with questions of the candidate's appropriateness for the technical duties of county clerk or county surveyor.

Where efforts at modernization have been possible at all,

they have usually been proposals for application to the county of the city manager plan impaired by various concessions and compromises to an extent that has seriously affected its essential merit of unification of powers and the short ballot. None of these charters has been adopted and there does not yet exist a model to point to.

Valuable breaking of ground, however, has been done.

In 1912, California passed an amendment enabling counties to frame their own charters (as the cities have done for twenty years) and wiped out the legal obstruction to progress in that state. Two counties, Alameda and San Diego, submitted county manager plans but both were defeated. Los Angeles county and other counties improved their respective governments in various ways, but there is as yet no object lesson produced by California's experience.

Maryland has likewise empowered its counties to draft and adopt their own forms of government. Only one county, Baltimore (outside the city of Baltimore), has utilized the power, but the county manager plan submitted then was defeated.

Montana in 1923 let down the legal barriers with Butte especially in mind and Butte drafted an interesting consolidated city and county charter with a city-and-county manager, all political divisions within the county being abolished. If passed in the fall of 1923 this will give us the first real county manager in the country.

New York has passed an amendment allowing certain two counties, Westchester and Nassau, adjoining New York City, to prepare homemade charters subject to both legislative and local referendum approval and both counties are at work on the subject with locally important but rather piecemeal programs. Both charters create strong elective executives.

In no other state except Nebraska, where the constitution is entirely silent on counties, can anything be done until the removal of constitutional obstacles.

In counties where the boundaries are nearly coterminous with large cities, the natural reform is consolidation of the two governments and for this there are several successful precedents, namely Baltimore, San Francisco, Denver, St. Louis, and New

York City. All of these unions except Denver are rather incomplete and offer no model worth copying elsewhere, for they all have a string of separate elective county officers to run themselves as little independent governments, the consolidation being limited to mergers of the representative-appropriating bodies. In Denver, however, the union was more complete and the various county officers lost their independence and became an interlocking part of the city government.

*What the Model Constitution Provides*

In the model state constitution the short sections entitled "Counties" explain themselves.

Sec. 85 safeguards the process of dividing counties to create new sets of political jobs, a vice of some of the Western states.

Sec. 86 empowers the legislature to devise ready-made optional forms of county government which a county may select and adopt by local referendum. This follows the similar optional city charter laws of about a dozen states including Massachusetts, New York and Ohio.

Sec. 87 gives counties the power to draft and adopt charters of their own devising as in California, Maryland and Montana.

Sec. 88 facilitates city-county consolidation.

There can be no doubt of the soundness of thus giving to counties the same freedom to progress that the cities of the home rule states have so long enjoyed.

Just what could be or should be developed in the way of a new type of county government under such free conditions of growth is not yet provable.

The Butte city-county manager plan is a simple adaptation to the county of the city manager plan and a model so far as it goes.

It is not to be assumed, however, that the county of the future is simply to be the county of today internally reorganized and straightened out!

Much of the county government's work ought to be taken over by the state. The judges ought to be appointed by the governor, and the district attorneys and sheriffs ought to be appointed by the attorney-general, who himself should be an

appointee of the governor—just as in the Federal government. That would leave very little county government.

On the other hand, within the last twenty years, the decades of the automobile and the good road, counties have become suddenly shrunken to community dimensions. The county has abruptly become a possible geographical unit for schools, health, libraries, recreation, welfare, police and public works. The village and the township are becoming obsolete. If only the ramshackle county government were ready to take over the small-scale local functions of the little one-horse units, and do the work with the economy and superior technique which a larger unit ought to be able to offer, we should be already witnessing the rapid development of the counties as strong rural municipalities, bringing to country and small-town dwellers the blessings and conveniences of urban civilization and science and modern collective service!

## APPENDIX II

### HARE SYSTEM OF PROPORTIONAL REPRESENTATION ("P. R.")<sup>1</sup>

#### EFFECTIVE VOTING

*For City Councils, State Legislatures, the National House of Representatives, and Other Policy-Determining Bodies,  
Public and Private*

"Proportional representation with the single transferable vote" (the "Hare System") is already in use in many parts of the English-speaking world for the election of representative bodies, public and private.

Proportional representation with the single transferable vote—"P. R.," as it is called for short—has been developed to get rid of three crying evils in our old methods of electing representative bodies.

(1) Our commonest method, election by wards or single-member districts, virtually disfranchises, so far as representation goes, all the voters of each district who do not vote for the winning candidate. The voters thus shut out from any voice in the representative body may be a great part of the entire number. Consider these cases:

#### CONGRESSIONAL ELECTIONS, INDIANA, 1912 THIRTEEN DISTRICTS

	VOTE	REPRESENTA- TIVES ELECTED
Democrats .....	291,288	13
Republicans .....	166,698	0
Progressives .....	127,041	0
Others .....	55,807	0

<sup>1</sup> From Leaflet No. 5 of the Proportional Representation League, February, 1923. Reprinted by permission of the League.

CONGRESSIONAL ELECTIONS, MAINE, 1914  
FOUR DISTRICTS

	ELECTED
Republican Majority in Dist. 1. . . . . 567	Rep.
Democratic Majority in Dist. 2. . . . . 5,173	Dem.
Republican Majority in Dist. 3. . . . . 1,515	Rep.
Republican Majority in Dist. 4. . . . . 2,726	Rep.
Dem. Maj. in State, 365. Elected, 1 Dem., 3 Reps.	

The number of voters whose ballots counted for nothing in the election (by single-member districts) of the State Senate of Pennsylvania in session in 1919 was 444,512.

(2) Another of our old methods (still used for the commission or council in many cities operating under the manager plan of government), the election of the members at large with each voter allowed to cast as many votes as there are members to be elected, divides the voters at the polls into winners and losers. Yet obviously, unless we are to throw away all the advantages of representative government, such a division should be made only *in* the representative body itself after discussion. In *making up* such a body what is called for is not *division* of the voters but merely *condensation* of them into their leaders or spokesmen.

This "general ticket" or "block vote" method, which is used in New Jersey to elect blocks of state assemblymen by counties, in 1919 gave 37,386 Democratic voters of Essex county 12 senators, 37,003 other voters none.

Any system of proportional representation—and there are several besides the Hare—gets rid of both these evils by combining the good points of the two old systems and rejecting their bad ones. P. R. simply throws several single-member districts together into one electing several members, but it allows each voter to cast only one vote. This results in giving all the voters in the district an equal share in the election of the several members and in giving each party or united element its proportionate share.

(3) The third fundamental evil of our old systems of election—and this applies to elections for other officials as well as to those for representatives—is their failure to permit the voter to express his will on the ballot as fully as he pleases so that it can be made effective without regard to how others have voted. Suppose A, B and C are candidates for one office, and suppose you prefer C, but think he has no chance of being elected. Under our old methods of voting you may not dare to vote for C for fear of “throwing your vote away.” Every year millions of voters in this country mark their ballots for candidates whom they do not really want. Thus to the great errors shown by the examples under (1) and (2) above we must add the countless unseen errors due to the voter’s inability, under our old systems, to express his real will on the ballot without danger of throwing his vote away.

It is this third weakness of our old methods that is the chief basis, so far as the mechanics of elections are concerned, of the undue power of the “machine” in American politics.

The crudest systems of proportional representation, for example that formerly used for Parliamentary elections in Japan, do not correct this evil at all. Others, such as the better systems of the Continent and Scandinavia, cure it partially. The Hare system cures it completely. The method is simple: the Hare system permits, though it does not require, the voter to indicate on his ballot which candidate he wants his one vote to count for in case it cannot help elect the candidate marked as first choice, which one he wants it to count for in case it cannot help elect either his first choice or his second, etc.; and it provides for the carrying out in the count of the wishes expressed thus.

The first effect of such provisions is that the voter gives his first choice to the candidate he likes best no matter how small the chances of that candidate are supposed to be, providing against the possibility of wasting his vote by marking other choices for other candidates. The second effect is that the nomination of more candidates of a party than it can hope to elect does not “split the party vote” and lose seats for the party. And this means that if the candidates—say Hughes, Lodge, and



Watson in the illustration given below—nominated by the “machine” of a party are not acceptable to all its supporters, those who are dissatisfied will freely nominate others, say Hoover and Borah; and it means that such rivals to the “regular” party candidates can accept such nomination, and voters of the party can vote for them, without laying themselves open to the charge of “splitting the party vote.”

The final upshot of this feature of the system is to make it possible for the voters of a party to control the party “machine” conveniently and without giving to politics more time than can reasonably be given by men and women who seek nothing in politics for themselves.

It is hoped that many readers will give thought to this advantage of the Hare system and come to realize its profound importance for the future of our country.

These three fundamental improvements can best be understood in connection with

## AN ILLUSTRATIVE ELECTION

Suppose we are electing a municipal council of five members, five members of a state legislature from a district, or the five members of a board of directors.

### NOMINATIONS

No primaries are required: the preferential feature of the Hare system brings together the ballots of like-minded voters—far more effectively than a primary election can do it—so as to elect from each element or party those candidates who are really preferred by its voters.

Candidates are usually nominated by petition, the number of names required for making each nomination being small enough to give reasonable freedom but large enough to prevent encumbering the ballot with useless names. In connection with the Hare system it is reasonable to prohibit any voter from taking part in the nomination of more than one candidate.

## BALLOT AND VOTING

Voting under the Hare system should be on a separate ballot.

The usual form of the ballot and the method of voting are shown below. Of course no significance should be attached to the particular names used in this illustration.

The figures in the squares show the ballot marked correctly by a voter who prefers Hughes to all the others, whose next descending choices are Hoover, Borah, Lodge, McAdoo, and Mrs. Catt, and who has no choices among the remaining candidates.

## SAMPLE BALLOT

## DIRECTIONS TO VOTERS:

Put the figure 1 opposite the name of your first choice. If you want to express also second, third, and other choices, do so by putting the figure 2 opposite the name of your second choice, the figure 3 opposite the name of your third choice, and so on. You may express thus as many choices as you please, without any regard to the number being elected.

Your ballot will be counted for your first choice if it can help him. If it cannot help him, it will be transferred to the first of your choices whom it can help.

You cannot hurt any of your favorites by marking lower choices for others. The more choices you express, the surer you are to have your ballot count for one of them. But do not feel obliged to express choices that you do not really have.

A ballot is spoiled if the figure 1 is put opposite more than one name. If you spoil this ballot, tear it across once, return it to the election officer in charge of the ballots, and get another from him.

## FOR THE COUNCIL

3	William E. Borah
6	Carrie Chapman Catt
	Samuel Gompers
	Morris Hillquit
2	Herbert C. Hoover
1	Charles E. Hughes
4	Henry C. Lodge
5	William G. McAdoo
	James E. Watson

RESULT SHEET <sup>1</sup>

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
Borah ...	5	5	4	5	2	5	4	5	5	5	4	4	2	3	3	1	1	1	1	1	1	4	1	1	6	5	1	5	1	1
Catt .....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Gompers ..	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Hillquit ..	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Hoover ..	4	3	5	4	5	4	5	4	5	2	3	2	1	1	1	1	2	3	2	1	3	5	2	1	5	4	4	6	1	1
Hughes ..	3	4	3	2	4	1	1	1	1	1	1	1	3	2	4	3	4	4	1	1	7	1	1	1	7	1	1	7	1	1
Lodge ...	2	2	1	1	1	2	2	2	2	4	2	5	4	4	6	4	2	3	1	1	8	1	1	1	8	1	1	1	1	1
McAdoo ..	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Watson ..	1	1	2	3	3	3	3	3	3	3	3	5	1	1	1	1	5	5	6	1	1	1	1	1	1	1	1	1	1	1

The thirty ballots used for the illustration were marked as shown below. Each column stands for a ballot.

Ballot No. 19 is invalid, as it does not show who is the voter's first choice.

## THE PRECINCT COUNT

If the votes are first counted at the precincts, only the first choices are counted there, the ballots being then sent, in packages according to first choices, to the central counting place of the entire multi-member district. This presents no difficulties to the precinct election officials.

## THE CENTRAL COUNT

At the central counting place the first thing done is to find the total number of first choices for each candidate. The record of these choices is shown in Column 1 of the Result Sheet above. Very small numbers are used to make the illustration simple. The figures in the other columns will be clear from the explanation of the count which follows the Result Sheet.

## ASCERTAINMENT OF QUOTA

As soon as the total number of valid ballots, in this case 29, is known, the election board ascertains the quota, that is, *the smallest number of ballots which for a certainty will secure the election of a candidate*. This number, the smallest that is so large that no more than five candidates can each get it when 29 valid ballots are cast, is barely more than a sixth of 29. The division of 29 by 6 yields  $4 \frac{5}{6}$ . Although six candidates might get as many as 4 ballots each, it would be impossible for more than five to get as many as 5 each. The number sufficient for election, therefore—the quota—is 5.<sup>2</sup>

*Election of Hughes and McAdoo*  
(Column 1)

Hughes and McAdoo have each received the quota of ballots. They are therefore declared elected at once.

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<sup>2</sup> The general rule for determining the quota is to divide the total number of valid ballots by one more than the number to be elected and to add one to the result, disregarding fractions.

*Transfer of Hughes' Surplus*  
(Column 2)

As the two ballots received by Hughes in excess of the quota would be wasted if allowed to remain with him, they are transferred to other candidates, each of them in accordance with the next choice expressed on it.<sup>3</sup>

One of them is marked for Hoover as second choice. It is therefore added to his pile<sup>4</sup> (Column 2), making his total 4, as shown in Column 3. The other, marked for Lodge as second choice, is passed to his pile, bringing his total also up to 4.

*Transfer of Hillquit's Ballot*  
(Column 4)

It now becomes necessary to declare defeated the candidate at the bottom of the poll, in this case Hillquit, and to transfer

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<sup>3</sup> The question may be asked: Which 2 ballots should be taken for transfer and which 5 left as the quota to elect Hughes? Of course the selection should be made on some principle that will work out fairly for all candidates marked as lower choices on the Hughes ballots. One method is to examine *all* the Hughes ballots in respect to next choices and to take for transfer the two that are representative, as nearly as possible, of the whole lot in respect to next choices. This method, referred to in publications of the P. R. League as the "exact" method, is used wherever P. R. is used in British Dominions and also in two American cities.

Where the number of ballots is large, selecting the surplus ballots at random, that is, by chance, is sufficiently accurate to be entirely defensible, the error that is likely to result being but a trifling fraction of one per cent. And whatever error may occur is unimportant in character, for in any case none of the voters have just grounds for complaint; those whose ballots are left are treated fairly, for they help elect their first choice; and as for those whose ballots are taken for transfer, they must certainly be satisfied, for their first choice is elected by others and their ballots are used to elect the next available choice marked on each. With a modification that cuts down the scope of chance somewhat, this simplest method of selecting the surplus ballots is in use in Ashtabula, Ohio, and is to be used in Cleveland.

<sup>4</sup> Some American cities which use the Hare system provide a tally clerk to receive and tally all ballots credited to that candidate. This is a good method. A tally clerk can decline to accept any ballot passed to his candidate erroneously, keep the candidate's tally sheet, and notify the official in charge when his candidate receives the quota.

The precautions to provide for honesty, accuracy, and orderliness in the conduct of the count are such that no charge of irregularity has ever been made, so far as we know, in connection with a Hare election.

his ballot. If the ballot credited to him were allowed to remain with him, it would be wasted. It is therefore transferred to the unelected candidate marked on it as next choice, Gompers (Column 4).

*Transfer of Watson's Ballots*  
(Column 6)

The ballots of Watson, who is now at the bottom of the poll, must be transferred next. The first of them shows a next choice for Lodge and is therefore transferred to him. That gives Lodge his fifth ballot, completing his quota, and he is at once declared elected. The second Watson ballot shows a second choice for Lodge and a third for Hoover. It goes to Hoover because Lodge, being elected already, cannot be helped by it. It completes Hoover's quota, and he is declared elected.

*Transfer of Gompers' Ballots*  
(Column 8)

Looking up Column 7 to see who now stands lowest, the counting board finds three candidates tied with 3 ballots each. Applying the rule for deciding ties, they go back, count by count, until (Column 3) one of the tied candidates, Gompers, stood lower than the others. Declaring him defeated, they proceed to transfer his ballots. Two of them, showing no next choice for a candidate still undefeated and unelected, are put into the pile of "ineffective" ballots. The third is marked for Hillquit as second choice and for Mrs. Catt as third. As Hillquit is defeated and out of the running, it is given to Mrs. Catt.

*Election Ended*  
(Column 9)

When Borah, the candidate now lowest, is declared defeated, only one candidate, Mrs. Catt, remains to fill the one remaining seat. It is therefore unnecessary to transfer Borah's ballots at all. The fifth and last seat goes to Mrs. Catt.

### RESULTS OF THE SYSTEM

The fundamental differences between this system of electing a representative body and our old ones were briefly explained

above. They can be understood by a study of the illustration. But many of their effects can be learned only from experience. Fortunately experience is not lacking. Its teachings may be summed up as follows:

The Hare system of P. R. saves the trouble and expense of primaries.

It makes it easy for the voter to control, instead of the party "machine."

It reduces incentives to corruption: a few crucial votes in close districts will no longer turn the scale.

It makes the representation of localities as such possible but not compulsory.

It lets the voters, with very few exceptions, share equally in electing the body which levies and spends the taxes of all.

It engenders steady progress instead of vacillation between extremes.

It tends to allay social unrest by giving a fair hearing to all elements.

It provides the basis for greater efficiency of administration: a council or commission elected by it is fit to be intrusted with the selection and oversight of the chief administrator, who can therefore be engaged and if necessary replaced on a professional basis. In other words, it provides a democratic basis for the "manager plan" of city government.

## APPENDIX III

### THE SHORT BALLOT <sup>1</sup>

#### *A Movement to Simplify Politics*

We have in the United States a peculiar system of representative government and after patient trial for many generations it is under indictment and suspicion. It often fails to register the will of the people and in fact may brazenly and successfully defy the people on a given issue. In New York state both parties some years ago found it expedient to promise in their platforms to enact a direct primary system of nominations. The people elected a Republican legislature, then a Democratic one and finally a combination of a Republican Assembly and a Democratic Senate—but they didn't get direct primaries till years after. Illinois has seen both parties declare for a reform and muster hardly a vote for it in the legislature. Oregon has seen its legislature scorn proposals which passed by an overwhelming popular vote when submitted to the people later by initiative. Congress knew well enough that the people desired parcel post, but for years continued impassive, and its members got little or no political punishment. The insubordination of our city governments to popular wish is too commonplace to require review. Although the people may be ready to vote overwhelmingly for a measure, their nominal agents and servants in the representative system will frequently maintain a successful indifference or resistance election after election. Our governments are less anxious to please the people than they are to please the politicians who thus become an irresponsible ruling class with a vast and marketable influence. Our representative system is *mis*-representative. Many Americans, impatient with it, have been demanding access to an addi-

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<sup>1</sup> By Richard S. Childs. Reprinted by permission of the author, the National Municipal League, and *The Outlook* Company.



tional and alternative system, namely, direct legislation by the Initiative and Referendum.

Nevertheless the representative system cannot be abandoned. With or without the Initiative and Referendum there must still be an organization of public officials to interpret the will and execute the work of the people. Since it is to continue, it must be subdued and made an obedient servant.

Our insubordinate representative system is a unique American phenomenon.

This unique ability of our governmental servants to disobey the people and survive to disobey again suggests that of the many peculiarities in our system of government some may be unsound and unworkable.

### ANALYSIS OF PRESENT CONDITIONS

#### *Blind Voting*

Starting at the broad base of our structure, the voters, we notice one unique phenomenon which is so familiar to us that we usually overlook it entirely—that is *our habit of voting blindly*. Of course intelligent citizens do not vote without knowing what they are doing. Oh, no. You, Mr. Reader, for instance, you vote intelligently always! Of course, you do! But whom did you vote for for Surrogate last time? You don't know? Well, then, whom did you support for State Auditor? For State Treasurer? For Clerk of the Court? For Supreme Court Judge? And who is your Alderman? Who represents your district at the State Capitol? Name, please, all the candidates you voted for at the last election. Of course you know the President and the Governor and Mayor, but there was a long list of minor offices besides. Unless you are active in politics, I fear you flunk this examination. If your ballot had by a printer's error omitted the "State Comptroller" entirely, you would probably not have missed it. It was a long ballot; you found from 15 to 50 offices on it—30 to 200 candidates—and you exercised personal discrimination for reasons of your own as to several conspicuous ones; and for the rest you voted blindly for all the Republicans or all the Democrats. You ignored nine-tenths of your ballot, voting for those you did

know about and casting a straight party ticket for the rest, not because of party loyalty, but because you did not know of anything better to do. You need not feel ashamed of it. Your neighbors all did the same; ex-President Eliot of Harvard, the "ideal citizen," confessed in a public address once, that he did it, too. I have heard a Governor of one great state remark in a private conversation that he had never voted intelligently in his life except for the head-of-the-ticket candidates. It is a typical and universal American attitude. We all vote blindly. Philadelphia has even elected imaginary men. The judgment of the community is not being applied to any of the minor offices on the ballot. The average American citizen never casts a completely intelligent vote. And a man who votes blindly is being bossed!

#### AN EXHIBIT OF BLIND VOTING

Answers collected from voters immediately after election in the most independent Assembly District in New York State (XII. A. D., Brooklyn).

Do you know the name of the new State Treasurer just elected? *Replied No—87%*

Do you know the name of the present State Treasurer? *Replied No—75%*

Do you know the name of the new State Assemblyman for this district? *Replied No—70%*

Do you know the name of the defeated candidate for Assemblyman in this district? *Replied No—80%*

*Knew both of above—16%*  
Do you know the name of the Surrogate of this County? *Replied No—65%*

Do you know the name of your Alderman? *Replied No—85%*

Are you in active politics? *Replied No—96%*

#### *Should We Blame the Voters?*

This is not all the fault of the voter. To cast a really intelligent ballot from a mere study of newspapers, campaign litera-

ture and speeches is impossible because practically nothing is ever published about the minor candidates. And this in turn is not always the fault of the press. In New York City the number of elective offices in state, city and county to be filled by popular vote in a cycle of four years is nearly five hundred. In Chicago there have been six thousand nominees in a single primary election. Philadelphia, although smaller than these cities, elects more officials than either. No newspaper can give publicity to so many candidates or examine properly into their relative merits. The most strenuous minor candidate cannot get a hearing amid such confusion. And the gossip around the local headquarters being too one-sided to be trusted by a casual inquirer, a deep working personal acquaintance with politics, involving years of experience and study, becomes necessary before a voter can obtain the data for casting a wholly intelligent ballot.

Plainly the voter is overburdened with more questions than he will answer carefully, for it is certain that the average citizen cannot afford the time to fulfill such unreasonable requirements. Since the voters at the polls are the foundation of a democracy, this universal habit of voting blindly constitutes a huge break in that foundation which is serious enough to account for the toppling of the whole structure.

Let us see if we can trace out a connection between this as a cause and "misrepresentative government" as the effect.

### *Blind Voting Leads to Government by Politicians*

No one will deny that if nine-tenths of the citizens ignored politics and did not vote at all on election day, the remaining tenth would govern. And when practically all men vote in nine-tenths ineffectiveness, about the same delegation of power occurs—the remaining fraction who do give enough time to the subject to be politically effective, take control.

That fraction we call "politicians" in our unique American sense of the word. A "politician" is a political specialist. He is one who knows more about the voter's political business than does the voter himself. He knows that the coroner's term will expire in January, and contributes toward the discussion in-

volved in nominating a successor, whereas the voter hardly knows that a coroner is being elected.

The politicians come from all classes and ranks, and the higher intelligence of the community contributes its full quota. Although they are only a fraction of the electorate they are a fair average selection and they might give us exactly the kind of government we all want if only they could remain free and independent personal units. But the impulse to organize is irresistible. Convenience and efficiency require it, and the "organization" springs up and cements them together. Good men who see the organization go wrong on a nomination continue to stay in and lend their strength, not bolting unless moral conditions become intolerable. Were these men not bound by an organization with its social and other nonpolitical ties, their revolt would be early, easy and effective and every bad nomination would receive its separate and proportionate punishment in the alienation of supporters.

#### *Politicians Can't Exclude Public Enemies from Their Ranks*

The control of an active political organization will gravitate always toward a low level. The doors must be open to every voter—examination of his civic spirit is impossible—and greed and altruism enter together. Greed has most to gain in a factional dispute and is least scrupulous in choice of methods. The bad politician carries more weapons than the politician who hampers himself with a code of ethics one degree higher. Consequently corruption finally dominates any machine that is worth dominating and sinks it lower and lower as worse men displace better, until the limit of public toleration is reached and the machine receives a set-back at election. That causes its members to clean up, discredit the men who went too far, and restore a standard high enough to win—which standard immediately begins to sag again by the operation of the same natural principle.

Reformers in our cities have given up the endeavor to maintain pure political organizations on the model of the regular party organizations. A typical experience is that of the Citizens' Union of New York, whose leaders have always been

sincerely bent on improving the conditions of politics. The Union acquired power enough to become an important factor in elections. After the first such election, small political organizations which had aided toward the victory rushed in, clamoring for plunder. For a term or two the reformers were able to resist the pressure. Nevertheless the possession of power by their party inevitably attracted the self-seekers; the reformers found themselves accepting assistance from men who turned out to be in politics for what there was in it, men who wanted to use the power and patronage that lay at hand unutilized, and it was clear that those men would in time, working within the Union, depose the original heads of the party, and substitute "more practical" leaders of their own kind, until in time the Citizens' Union would itself need reforming. So the Union retired from the field as a party, broke up the district organizations which had yielded to corruption and adopted a less vulnerable type of internal government in order to preserve its purity of purpose.

It is obvious that most political parties do not thus commit suicide to evade internal contamination and lapse of principle!

Theoretically there is always the threat of the minority party machine which stands ready to take advantage of every lapse, but as there is no debate between minor candidates, no adequate public scrutiny or comparison of personalities, the minority machine gets no credit for a superior nomination and often finds that it can more hopefully afford to cater to its own lowest elements. In fact, it may be only the dominant machine which can venture to affront the lowest elements of its membership and nominate the better candidate.

*Misrepresentative Government the Normal Result of  
Government by Politicians*

The essence of our complaint against our government is that it represents these easily contaminated political organizations instead of the citizens. Naturally! When practically none but the politicians in his district are aware of his actions or even of his existence, the minor elective officeholder who refuses to bow to their will is committing political suicide.

Sometimes the interests of the politician and the people are parallel, but sometimes they are not and the officeholder is apt to diverge along the path of politics. An appointment is made, partly at least, to strengthen the machine, since the appointee has a certain following. A bill is considered not on its simple merits but on the issue—"Who is behind it?" "If it is Boss Smith of Green County who wants it, whatever his reasons, we must placate him or risk disaffection in that district." So appointments and measures lose their original and proper significance and become mere pawns in the chess game of politics which aims to keep "our side" on top. The officeholders themselves may be upright, bribeproof men—they usually are, in fact. But their failure to disregard all exigencies of machine politics constitutes misrepresentative government and Boss Smith of Green County can privately sell his influence if he chooses, whereby the public is in the end a heavy sufferer.

### *Summary of the Analysis*

Thus the connection between the long ballot and misrepresentative government is established: By voting the long ballot blindly, we relinquish large governing power into easily contaminated organizations of political specialists, and we must expect to get the kind of government that will naturally proceed from their trusteeship.

Every factor in this sequence is a unique American phenomenon. Our long ballot with its variegated list of trivial offices is a freak among the nations. The English ballot never covers more than three offices, usually only one. In Canada the ballot is less commonly limited to a single office, but the number is never large. A Swiss would have to live a hundred years to vote upon as many men as an American undertakes to elect in one day. To any foreigner our long ballot is astonishing and our blind voting appalling. We, with our huge ballots, require our citizens to be twenty to fifty times as alert as foreign citizens in order to keep from electing men they don't really want. The politicians as a professional class, separate from popular leaders or officeholders, do not prevail in other lands and the

very word "politician" has a special meaning in this country which foreigners do not attach to it. And government from behind the scenes by politicians, in endless opposition to government by public opinion, is the final unique American phenomenon in the long ballot's train of consequences.

*The Voting That Is Not Blind*

The blind vote, of course, does not take in the whole ballot. Certain conspicuous offices engage our attention and we all vote for those with discrimination and care. We go to hear the speeches of the candidates for conspicuous offices, those speeches are printed in the daily papers, and reviewed in the weeklies, the candidates are the theme of editorials, and the intelligent voter who takes no part in politics votes with knowledge on certain important issues.

In an obscure contest on the blind end of the ballot, conformity with popular opinion has little political value, but in these conspicuous contests where we actually compare man and man, complete compliance is a definite asset to a nominee. Hence in the case of an obscure nomination, the tendency is automatically away from the people, but in a conspicuous nomination the tendency is toward the people.

Accordingly while we elect aldermen who do not represent us, and legislators who obey the influences of unseen powers, we are apt to do very well when it comes to the choice of a conspicuous officer like a president, a governor, or a mayor. For mayor, governor or president we are sure to secure a presentable figure, always honest and frequently an able and independent champion of the people against the very machine that nominated him. We are apt to reelect such men, and the way we sweep aside hostile politicians to do it shows how strong is our impulse to reward the faithful servant.

And so in these conspicuous offices—those for which we do *not* vote blindly—we secure comparatively sensitive obedient government as a normal condition, considering that the organized and skillful opposition which always faces us occupies a position of great strategic advantage in possession of the nominating machinery.

## THE REMEDY

We cannot hope to teach or force the entire citizenship to scrutinize the long ballot and cease to vote blindly on most of it. The Mountain will not come to Mahomet; Mahomet then must go to the Mountain.

*First*—We must *shorten the ballot* to a point where the average man will vote intelligently without giving to politics more attention than he does at present. That means making it very short, for if the number of these simultaneous elections is greater than the bulk of the citizens care to keep track of, then we have government by the remaining 40 per cent or 20 per cent of the citizens—and no matter whom we believe to be at fault, that plan in practice will have resulted in oligarchy and be a failure. The test for shortness is to inquire, when a given number of offices are filled by election, whether the people vote blindly or not on any one of them. For if they begin to require “tickets” ready-made for their convenience, they are sharing their power with the ticket-makers—and democracy is fled!

*Second*—We must put on the elective list only offices that are naturally conspicuous. The petty offices must either go off the ballot and be consolidated under a responsible appointing power, no matter how awkwardly, or they must be increased in real public importance by added powers until they rise into such eminence as to be visible to all the people. The County Surveyor, for instance, must go, for the electorate will not bother with such trifles whether the ballot be short or not. Why indeed should 50,000 voters all be asked to pause for even a few minutes apiece to study the relative qualifications of Smith and Jones for the petty \$3,000-a-year post of County Surveyor? Any intelligent citizen may properly have bigger business on his hands!

And the Alderman—we can’t abolish him perhaps, but we can increase his power by enlarging his district and lengthening his term and making his Board a small one. We could not make people in Philadelphia agitate themselves over the choice of a Common Councilor who was only one one-hundred-and-fortieth of the city legislature! Democracy took courage when



that big two-house Council was replaced by a single house of 21 members.

That candidates should be conspicuous is vital. The people must be able to see what they are doing; they must know the candidates—otherwise they are not in control of the situation, but are only going through the motions of controlling.

### *The Short Ballot Applied*

To be pictorial, let us see how a revised schedule of elections might look if we put into the realm of appointment (*i.e.*, consolidated) as many as possible of those offices which the people now ignore. Most county offices, many city positions and the tail of the State ticket would thus be disposed of. In Oregon the Peoples' Power League (which devised the Initiative, Referendum and Recall) once proposed to capture the representative system for the people by an initiative petition to shorten the November ballots to the following schedule:

<i>First Year.</i>	<i>Second Year.</i>	<i>Third Year.</i>	<i>Fourth Year.</i>
President and Vice-President four years	Governor four years <i>Appoints all state administration, and Sheriffs and District Attorneys</i>	Congressman two years	Judges
Congressman two years	State Auditor four years	3 County Directors four years <i>Appoint all other county Officers</i>	
Senator six years	State Representative four years ( <i>State Senate abolished</i> )		

City elections in Oregon come at other times of the year and can easily be simplified and in some cases Short Ballot plans have already been adopted. There is endless room for discussion as to the details and many other arrangements could be

devised. This schedule provides for every office which must be kept within the realm of politics. It provides short ballots which every man would vote intelligently without calling a political specialist to come and guide the pencil for him.

It may be objected that to take the minor offices off the state ticket, for instance, and make them appointive by the Governor would be giving too much power to the Governor. Well, somebody, we rarely know who, practically appoints them now! To have them appointed by a recognized, legally constituted authority is surely better than to have them selected by a self-established, unofficial, unknown and irresponsible coterie of politicians. There is no great peril in unifying power, provided we can watch what is done with it. (Suppose we were electing by popular vote not only the President and Vice-President of the United States, but the cabinet, the supreme court and the other Federal judges, the Federal marshals, district attorneys, foreign ambassadors and postmasters! Can you see how our superficial doctrinaires would resist the adoption of the present unified and bossless plan?)

### *The History of the Long Ballot*

In the early days of the republic the activities of the state and municipal governments were small and there were few offices. The long ballot came slowly and looked like a friend. Every time it grew longer a few more voters began to vote blindly till today (outside of rural elections, perhaps) everybody but a few political specialists votes blindly on part of his ballot. So we have today not democracy but government by political specialists—a ruling class—a self-created aristocracy of political insiders—and that is oligarchy! The fact that it was honestly intended to be a democracy is not enough to make it one. If it doesn't "democ," it isn't democracy!

### *The Short Ballot in Operation*

Fighting government-by-politicians now is like fighting the wind. If the government is to be brought within the sure control of the people, the ballot must be brought within the sure control of the individual voter. We must get on a basis where

the real intentions of the average voter find intelligent expression on the entire ballot so as to produce normally the kind of government the voters want, whether that kind be good or bad. It will in fact be good—not as good as the most enlightened of the populace may desire, but better than what the politicians can be expected to purvey. At any rate the right route to reform is via democracy and politics without any politicians at all. Popular government as distinguished from politicians' gov-

### BALLOT PAPER

1	<b>NETTLEFOLD.</b> (John Sutton Nettlefold, Winter- bourn, Edgbaston Park Road, Edgbaston, Gentleman.)	
2	<b>TUNBRIDGE.</b> (William Stephen Tunbridge, Rocklands, Woodbourne Road, Edgbaston, Solicitor.)	

This is a typical official ballot (actual size) for an English election. It shows the names of two candidates for a single office—Councillor from the ward. The people in each ward simply make one choice, and accordingly know just what they are doing on election day. The scrutiny of the people thus concentrated bars out unacceptable candidates almost automatically.

ernment is a matter of electing the people's men in the first place. To elect the people's men is first of all a matter of arranging for the maximum amount of concentrated public scrutiny at the election. The way for the people to keep popular enemies out of office is to refrain from electing them. And the way to refrain from electing them is to arrange to get a good look at every one of them at election time.

Were it otherwise, we would find misgovernment in British cities which, except for this feature, are ideally organized from

an American grafter's point of view. The British city authorities are hampered most unjustly by a hostile House of Lords, their machinery of government is ancient and complicated, and their big councils with committees exercising executive management over the departments, with ample opportunity for concealment of wrongdoing, with no restraining civil service examinations, with one-tenth of the laboring population on the municipal payrolls would apparently provide an impregnable paradise for the American politician of the lowest type. But the ballot for an English municipal election can be covered by the palm of the hand. It contains usually the names of two candidates for one office, member of the Council for the ward. (The Council elects the Mayor, the Aldermen and all other city officers.) Blind voting on so short a ballot is hardly conceivable. Every voter is a complete politician in our sense of the word. The entire intelligence of the community is in harness, pulling of course toward good government. An American ward politician in this barren environment, unaided by any vast blind vote, could only win by corrupting a plurality of the whole electorate, a thing that is easily suppressed by law even if it were not otherwise a manifest impossibility. So there are no ward politicians in England, no profession of politics, and misrepresentative government is abnormal. (The number of elective offices in English cities, by the way, is nevertheless greater than in ours, for there are many wards and those councils are consequently large. Don't think that the Short Ballot necessarily means few elective offices.)

### *Conclusion*

Just how we are to get rid of the great undigested part of our long ballot is a small matter so long as we get rid of it somehow. Govern a city by a big Board of Aldermen, if you like, or by a Commission as small as you dare make it. Read-just State constitutions in any way you please. Terms of office can be lengthened. Many officers, now elected, can be appointed by those we do elect. But manage somehow to get our eggs into the baskets that we watch!

For remember—we are not governed by public opinion but

by public-opinion-as-expressed-through-the-pencil-point-of-the-Average-Voter-in-his-election-booth. And that may be a vastly different thing! Public opinion can only work in broad masses, clumsily but with tremendous force. To make a multitude of delicate decisions is beyond its blunt powers. It can't play the tune it has in mind upon our complicated political instrument. But give it a keyboard simple enough for its huge, slow hands, and it will thump out the right notes with precision!

There is nothing the matter with Americans. We are by far the most intelligent electorate in the world. We are not apathetic. Apathy is a purely relative matter depending on how much is asked. Ask much of the people and you will see more apathy than if you ask little. If the people of Glasgow were asked to attend caucuses, primaries, conventions and rallies in support of the best candidates for Coroner, they too would stay home by their firesides and let the worst man have it. If they had our long ballot they would be in a worse mess than we are with it. And if we, on the other hand, could get their handy short ballot, we too would use it creditably. For our human nature is no worse than theirs. The Scotch immigrant in our midst is no more active a citizen than the rest of us. We are not indifferent. We do want good government. And we can win back our final freedom on a Short Ballot basis!

## APPENDIX IV

### ADMINISTRATIVE REORGANIZATION IN ILLINOIS<sup>1</sup>

The civil administrative code of Illinois, enacted in 1917, is probably the most important step taken in that or in any other state in the direction of a more efficient and better integrated state administrative system. It has attracted attention and aroused interest all over the country and has been studied and, to some extent, copied in a number of other states.

The code follows in the main the recommendations of the efficiency and economy committee, but with certain modifications. While the committee had recommended the creation of ten principal departments, the code provides for only nine, as follows: finance, agriculture, labor, mines and minerals, public works and buildings, public welfare, public health, trade and commerce, and registration and education. The code also carries out more consistently the principle of a single head for each department than the efficiency and economy committee had recommended. Each department is under a head, known as the director, who is appointed for four-year terms by the governor with the consent of the senate. The principle is thus adopted of having a single officer instead of a board in charge of executive functions. Exceptions to this rule, however, consist in the provision for the tax commission in the department of finance, the industrial commission in the department of labor, the public utilities commission in the department of trade and commerce and the normal school board in the department of registration and education. In these cases it was considered desirable to retain the board form of organization on account of the quasi-judicial or sub-legislative functions which they are called upon to perform. These boards are salaried, are appointed by the governor and senate, and serve for four-year terms, except that

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<sup>1</sup> Reprinted in part from the author's Supplement to the *National Municipal Review*, November, 1920.

the members of the tax commission and normal school board serve for six-year terms. Although nominally placed in the departments indicated, these boards are in reality largely independent of control by the directors of such departments. They are, however, under the general financial supervision of the director of finance, and the director of education and registration is chairman and *ex officio* a member of the normal school board. In addition to these executive boards, advisory and unpaid boards were also attached to some of the departments. More than fifty boards, bureaus, departments, and offices, the work of which was taken over by the nine departments established and had previously existed independently of each other, were specifically abolished.

In each of the nine departments there is an assistant director and other officers or heads of bureaus who are appointed by the governor in the same manner as the director, but are under the immediate control of the heads of departments. The governor is also charged with the examination and approval of the bonds of various state officers and may, in his discretion, require additional security. Civil service employees under the abolished officers and boards are transferred along with the functions of such abolished boards to the new departments created. One private secretary, who is exempt from civil service regulations, is provided for each director. Each department is given a considerable degree of control over its own internal organization. The director of each department is empowered to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its employees, and the distribution and performance of its business; and each department may employ necessary employees, under civil service regulations, and fix their compensation when not fixed by law. The governor is given no power of transferring services from one department to another; but one department may under certain circumstances require necessary assistance from another department; and the director of any department may require an employee of another department, subject to the consent of the superior officer of the employee, to perform any duty which he might require of his own subordinates. In order to avoid con-

flicts among the departments, it is provided that "the directors of departments shall devise a practical and working basis for coöperation and coördination of work, eliminating duplication and overlapping of functions. They shall, so far as practicable, coöperate with each other in the employment of services and the use of quarters and equipment." In order further to avoid duplication and friction, the department of finance is empowered "to investigate duplication of work of departments and the efficiency of the organization and administration of departments, and to formulate plans for the better coördination of departments." Whenever power is vested by the code in a department to inspect, examine, secure data or information, or to secure assistance from another department, a duty is imposed upon the department upon which the demand is made, to make such power effective.

The employees in each department may thus be subject to service in other departments and without extra pay. This transfer of employees has been made occasionally when one department happened to be rushed with the peak load of its work while some other department was able to spare some of its employees for this purpose. Incidentally, this tends to prevent a position in the state service from being considered such a sinecure as was formerly the case, since it provides for the steady occupation of employees. The code, moreover, specifically provides that each executive and administrative officer, with few exceptions, shall hold no other office or position of profit and shall devote his entire time to the duties of the office. Seven and one-half hours is made the standard working day and each department is required to be open for eight and one-half hours daily for the transaction of public business, except on holidays.

Previous to the enactment of the code, as has been indicated, there were more than a hundred separate and practically independent administrative agencies, which were in many cases scattered over the state, and it was impracticable for the governor to keep watch over such a large number of agencies or to know what was being done by them. The consolidation of these bodies into nine departments rendered it much more



feasible for the governor to keep himself acquainted with their activities. The code requires that each director of a department shall annually and at such other times as the governor may require report in writing to the governor concerning the condition, management, and financial transactions of his department. In practice, these reports are more frequently made, and the governor also requires quarterly financial statements from the constitutional elective officers. The heads of departments, moreover, have offices in the state capitol building where the governor can keep in close touch with their work and hold personal conferences with them regarding their duties at any time he may deem it desirable. Although some departments maintain branch offices in Chicago and other points in the state, the principal office of each department is located at Springfield, and some scattered branch offices maintained previous to the enactment of the code have been closed.

Shortly after the enactment of the code the practice was adopted of holding regular weekly meetings attended by the directors and assistant directors and, occasionally, the governor was also in attendance when important matters of policy were to be considered. The assistant directors also held meetings by themselves. At these meetings questions of duplication and the means of increasing coöperative action among the departments have been discussed, and the meetings have served to promote harmony and an *esprit de corps* among the personnel of the administrative departments. After the new plan of operation under the code, however, had gotten into good running order, these meetings were held less frequently and they are now held only upon call.

It is the duty of the advisory boards to study the entire field of their work; to advise the executive officers of the department upon their request; to recommend on their own initiative policies and practices which recommendations the executive officers of the department are directed duly to consider; and to advise the governor and legislature when requested or on their own initiative. These boards are also empowered to investigate the conduct of the work of their respective departments and for this purpose to have access to all official records

and papers and to require written or oral information. In order to avoid friction or misunderstanding between the advisory boards and the executive agencies under the code, it is provided that such boards must meet not less frequently than quarterly, and must permit the governor and director of the department concerned to be present and to be heard upon any matter coming before the board.

### *Finance Administration*

From the standpoint of general state administration, the most important department created under the code is the department of finance. The efficiency and economy committee, created in 1913, recommended the establishment of a state finance commission, to be composed of the state auditor, state treasurer and three appointive members. The auditor was to be empowered to audit the accounts of state officers and institutions and also of certain local officers, to investigate and enforce the collection of state revenues, and to issue to the fee-collecting offices certificates for which fees are paid, as a means of auditing collections from such sources. The civil administrative code, though creating a state finance department, could not, of course, materially change the position of the state treasurer and auditor, who are constitutional officers. The act might, however, have affected the statutory powers of the state constitutional officers, but failed to do so. Thus, the attorney-general still retains the power of collecting the inheritance tax, the auditor of public accounts still has charge of the supervision of banks and building and loan associations, and the secretary of state continues to supervise some corporations and to enforce the automobile laws. The existence of these statutory powers in the hands of independent, elective, constitutional officers tends to disintegrate the administration and to cause overlapping of functions. Both the state auditor and the director of finance have the power of audit, but a working arrangement has been made whereby the finance department does not make independent audits but accepts those of the state auditor. The director of finance may approve bills in a preliminary way, but, under the constitution, final approval is in the hands of the auditor. It should be noted that

the civil administrative code does not undertake to reorganize the whole field of state administration, and certain important agencies are unaffected. The department of finance does not control the state auditor and treasurer nor the administration of the revenue laws. The code does not affect the constitutional officers, such as secretary of state and attorney-general, nor their constitutional functions. It does not even affect their statutory functions. A number of statutory bodies and agencies are also left outside the code organization, such as the board of trustees of the University of Illinois, the adjutant-general and national guard, the state civil service commission, the legislative reference bureau, and the state library.

### *Conclusion*

In spite of the fact, however, that the civil administrative code did not, in some respects, go as far as it might have gone and, in others, could not go further on account of constitutional restrictions, it nevertheless has gone far toward introducing a scientific and efficient form of administrative organization in the state government and is undoubtedly one of the most comprehensive plans of administrative consolidation that has thus far been undertaken. No state, however, can expect to work out its political and governmental salvation through mere administrative machinery. The character of the men who work the machinery is equally if not more important. In the last analysis, therefore, the successful working of the civil administrative code is dependent on the competence of the governor and of his appointees to the directorships, but scientifically constructed machinery is a help to the most capable of officers, and this help has been in large measure supplied by the code.

APPENDIX V

CRIMINAL JUSTICE

HOW TO ACHIEVE IT <sup>1</sup>

*By Herbert Harley*

*Secretary of the American Judicature Society*

Perhaps we can state the entire problem under the following three heads:

I. We do not secure conviction and punishment<sup>2</sup> in a good many instances when there is undoubted guilt. This is due to the defects in the machinery of justice or in its operation. One consequence is that criminals who should be serving terms are at large, some of them making a business of crime. That accounts for one class of preventable crimes.

II. The failure to make conviction of the guilty prompt and sure means that our system lacks the deterrent effect upon which reliance must be placed for the restraint of many individuals who are lacking in moral qualities but who have sufficient intelligence to keep straight if they are convinced that punishment will surely be visited upon them. This accounts for another class of preventable crimes. The comparative absence of these first two classes in other English-speaking countries accounts largely for our relatively low standing.

III. The third preventable class comprises the offenses committed by the repeaters, or habitual criminals. Many of the most shocking crimes are attributable to persons who have failed

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<sup>1</sup> Supplement to the *National Municipal Review*, March, 1922. Reprinted by permission of the author and the National Municipal League.

<sup>2</sup> The word punishment is now pretty well purged of its old meaning of vengeance. In its new meaning it includes all forms of restraint, and they are understood to be forms of treatment looking to ultimate reform. The word is here used to imply restraint as a treatment intended to effect reform.

to be reformed or deterred by former convictions and sentences. The criminals in this class stand lowest in mental and moral qualities.

### *Defects in the Machinery of Justice*

Our system was largely created a century or more ago. Parts of it date back several centuries. Some of the oldest features are still entirely serviceable. In fact, in the formative stage of American institutions the whole system was fairly efficient, for it was created to meet the conditions which prevailed when there were no really large cities, few small cities, and judicial and administrative authority was in the hands of a few conspicuous officials.

But everything that has occurred to produce modern conditions in place of the primitive conditions of our great-grandfathers, has made for complexity of structure and has multiplied the agencies and the officials required to operate the machine. Speaking broadly these numerous officials are reasonably competent and are trying to get results.

But it would be just as sensible—or just as foolish—to try to run a big department store or a railroad without responsible management, and expect real efficiency, as to look for it in the machinery of justice as at present constituted in the typical state. Good personnel and good intentions are not enough. There must be a guiding hand if all these various and independent agencies are to coöperate intelligently.

This has led to the proposal for a "chief judicial superintendent," or a ministry of justice, or a judicial council. These are not conflicting proposals but all aim substantially at the same thing, to bring about a conscious and responsible direction and management.

One of the first things that any manager or managing board would require would be the recording and publication of complete statistics. At the present time we are practically without statistics and there is no means for coördinating the few and unsystematic figures kept by the police, the jailors, the magistrates' courts, the criminal courts, the prosecutors, and the managers of the reform schools, work houses, and prisons.

In the lack of adequate statistics we are generations behind other civilized nations.

Nothing better illustrates the helplessness of our judicial machinery than this defect, for any properly organized judiciary would take steps to supply this need if only to defend itself against random charges.

The first step in solving a problem is to ascertain precisely what that problem is. This can never be done until a standard system of recording is provided.

Without statistical records our system has no memory. It does not know what it has done heretofore, or the consequences of its actions, or what it should do in the future. As well expect a navigator who has been deprived of his logbook and instruments in mid-ocean to find port safely as to look for success under existing conditions, in the supremely difficult work of suppressing crime.

We do not know at present what crimes are most common throughout the state, subject to the administration of innumerable local officers; we do not know what classes of people contribute to various kinds of crime; we do not know what various judges do with respect to sentencing; we do not know what the results of various kinds of treatment and administration are. We are groping in the dark. It is no wonder that there is a lot of experimental legislation and a great deal of argument and dissension as to the right thing to do.

The two great needs just presented go hand in hand. There must be some central authority to effect efficient coöperation among the hundreds of different local authorities, and there must be statistical knowledge of every phase of the entire situation.

The great present need of our courts, both civil and criminal, is to unify them in a single state judicial system, or unified court. This unification is to be effected by providing a chief justice as the principal executive head of the entire system. For various departments representing the appellate and trial branches presiding justices are needed, to be selected from the sitting judges. These presiding judges with the chief justice will naturally compose the judicial council, or executive board.

The judicial council should have a large measure of authority to make and amend rules of procedure and should have complete administrative authority. The exercise of this authority would mean assigning judges who are not busy to assist judges whose dockets are overloaded; and the assigning of judges to the particular classes of cases for which their individual talents and training fit them. This would result in increased capacity of work of a higher average quality.

A judicial system so constituted would necessarily depend very much on reports from all the judges and justices of the state. It would soon have all the data bearing upon its administrative problems. It would determine administrative policies and observe results. It would keep the public informed through reports made annually or more often. It would call the judges of departments and divisions to meet at appropriate times to discuss the problems confronting the courts and the best means for solving them. It would weld the entire big body of localized and separated officials into a unit machine for getting results.

It is easy to see what this would mean in the practical work of crime suppression.

Such a central administrative body would have power to do work which is imperative but which cannot be done under the existing system in practically every state. It would improve methods and standardize justice throughout the state, taking advantage of every helpful discovery of better methods.

Such disgraces to our states as criminal trials in which it takes weeks to make up a jury would be impossible, because a sentiment for efficiency would be created which would stimulate sitting judges to exercise the inherent power of the courts to limit random questioning. In Ontario, where the people and the law are substantially the same as in one of our Northern states, it never takes more than half an hour to select a jury in a murder trial. We would accomplish something if we could always select juries in ten half-hours.

Under such a simple system we could soon correct the obviously dangerous and vicious system which permits, or requires, delays of weeks and months in reaching trial in cities where

judges are always sitting, but are behind with their work. There are enough judges in every state to keep the work up to date if there were means for utilizing them in an intelligent way. DELAY MEANS PERVERTED JUSTICE. Wherever there is delay there is a curable defect. Merely adding more judges who are not able to coöperate under intelligent leadership often fails to correct delay.

And delay begets delay. Our courts are put to a lot of unnecessary and time-consuming labor because they have got behind. Delay works with the deadly certainty of compound interest.

There is one factor in delay which the judicial council could not entirely cure. About half the states still require action by a grand jury before a person accused of a serious offense can be placed on trial. Very commonly in such states arrests are on warrants issued by a magistrate. Then comes a preliminary examination to ascertain if there is probable cause for holding the accused to the criminal court. If so held, there must be still another appearance by the prosecutor and the state's witnesses to convince the grand jury. Then finally the case is merely ready for trial.

Every step which increases the difficulty of prosecution works to the advantage of the criminal. Every delay makes it easier to buy off, or scare off, the state's witnesses. Every delay removes the case further from public attention and public opinion. In its excitement over fresh crimes the public unavoidably forgets the old ones, still dragging their way through the courts.

The states which have done away with the grand jury action, or made it optional with the prosecutor, have proved that in more than ninety-nine per cent of all felony cases the grand jury cannot possibly do any good, but may always do harm.

To correct the grand jury evil in the remaining states is likely to call for constitutional amendment, which is admittedly difficult. All the more reason, though, for providing speedily a directing head to the big machine so that the slack may be taken up wherever possible.



*Abolish City Police Courts*

The greatest scandals of criminal justice are usually found in the large cities, and usually in the police courts, or other inferior tribunals of this nature. These evils, with attendant delays, and a great deal of roughshod methods, can be eliminated by doing away with such inferior courts entirely.

It has been suggested that the imperative and important duties ascribed to the judicial council do not necessarily require the powers which have been discussed. It is said that the power to require uniform reporting of data, coupled with mere advisory power, would suffice. This doubtless, is in the main, true. A mere advisory council, in possession of all the facts, could accomplish nearly, or quite, as much by requesting judges to assist where needed and to standardize their methods along approved lines. In fact we have some experience in the equalizing of the work of trial judges in Wisconsin through a chief judge selected by the Circuit Court judges which justifies the belief that a great deal can be accomplished through mere advisory power. It may be that an extension of this principle to reach all the officials involved in the trial of all kinds of offenses throughout a state will lead the way to a great success.

## APPENDIX VI

### THUMB-NAIL SKETCHES OF THE FOUR PRINCIPAL TYPES OF CITY GOVERNMENT <sup>1</sup>

*By H. W. Dodds*

*Secretary of the National Municipal League*

There are four principal types of city government in the United States. Each type is here described in a few words, with a brief digest of the leading arguments employed by the friends and enemies of each plan:

#### I. THE DECENTRALIZED PLAN

*Description*—The mayor is elected on a partisan ticket by popular vote, along with numerous other officers, such as auditor, treasurer, assessors, city engineer, etc. The council is large and is elected by wards on a partisan ticket. Those administrative officials not elected are appointed by the mayor with the consent of the council. There are usually a number of administrative boards with overlapping terms (often longer than the term of the mayor); for example, a water board, a park board, a board of health, etc.

Ordinances (local laws) are passed by the council and may be vetoed by the mayor.

The rank and file of city employees may or may not be under civil service.

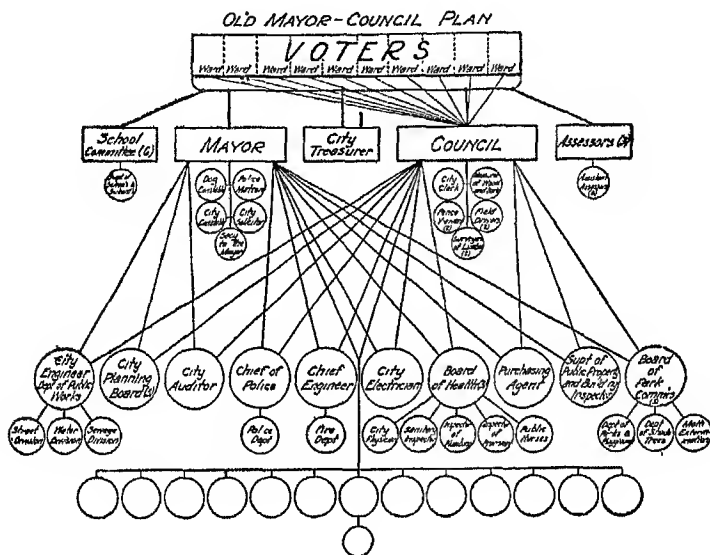
*Arguments Pro*—The large council elected by wards assures that every section of the city will be represented. Partisan elections preserve intact in the city our national political parties. The mayor, being compelled to share the appointing power with the council, is prevented from becoming an autocrat. The election of other administrative officials besides the mayor and the

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<sup>1</sup> From *American City Magazine*, April, 1923, pp. 351-354. Reprinted by permission of the author and the *American City Magazine*.

appointment of boards rather than single administrative heads for some departments prevent centralization of authority in a single person, which is undesirable and dangerous.

*Arguments Contra*—Experience has shown that a small council not elected by wards secures a higher type of official than the ward system, which gives nothing better than the ward politician. Since ward lines are, generally speaking, purely



arbitrary divisions of a city, there is no real need for ward representation. Election by wards starts logrolling between wards for special favors. The election of a large number of officials makes a long ballot, which means that the voter cannot know the quality of all those named on the ballot and so votes the whole ticket as the boss has planned it. The boss and not the voter, therefore, decides who will be elected.

The fact that the mayor is compelled to share the appointing power with the council, together with the fact that some administrative officials are elected, scatters and diffuses administrative

responsibility. This is wasteful and inefficient because there is no centralized power of control and supervision to coördinate various activities.

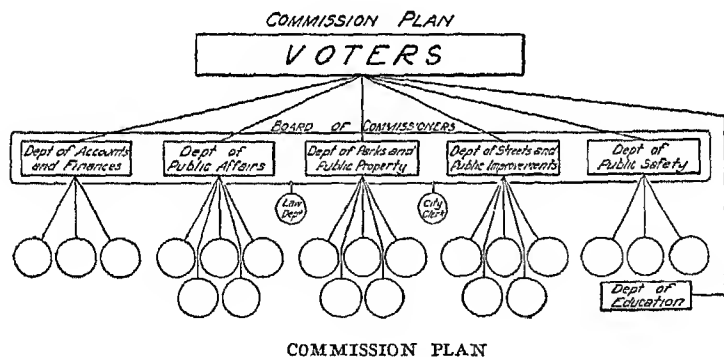
The mayor, being elected and often anxious for reelection, has political debts to pay.

The mayor and elected officials are usually politicians and amateurs in the highly technical business of the city.

The partisan ticket causes the voters to divide along national party lines rather than on local issues, which should properly be the issues of a municipal election.

The city government, not being organized along lines of clear-cut responsibility which the people can enforce, falls into the hands of the political boss, who pulls the wires of the extremely complicated organization, which the average citizen cannot understand.

A simple government is the most democratic because it is the easiest for the people to control. A complex government baffles all but the experts.



## 2. THE COMMISSION PLAN

*Description*—The people elect a commission of five persons who are responsible both for legislation and for the administration of the city. They are elected at large on a nonpartisan ticket. One of the commissioners is named mayor, usually by his colleagues, but his powers are ceremonial only.

The five commissioners sitting together pass ordinances and

determine administrative policies as a board. The work of the city is organized into five departments, with one commissioner at the head of each department.

The rank and file of city employees may or may not be under civil service.

*Arguments Pro*—All the affairs of the city are centralized in the hands of a single commission which can be easily watched by the voters. Election at large secures a high type of man. Election of only five makes it possible for the people to know all about all the candidates. A small group can transact business with more facility than a large council. The commission is responsible for both the tax rate and the service.

*Arguments Contra*—Commission government is five-headed administration. Administrative policy therefore is a series of compromises. The head of a department finds himself constantly overruled by the vote of other members. One of two results follows: either friction develops among the members, resulting in stalemate; or each commissioner is permitted to go his own way without consideration of other departments or the city as a whole. The city gets five little governments.

The commissioners, being elected on political platforms as legislators, are rarely good executives and scarcely ever experienced in the administration of municipal activities.

Many popular and trustworthy persons who would make good members of a legislative body are not by nature or equipment fitted to be executive heads of a city department.

The appropriating power and spending power are in the same hands, which encourages extravagances.

### 3. THE CENTRALIZED MAYOR-COUNCIL PLAN

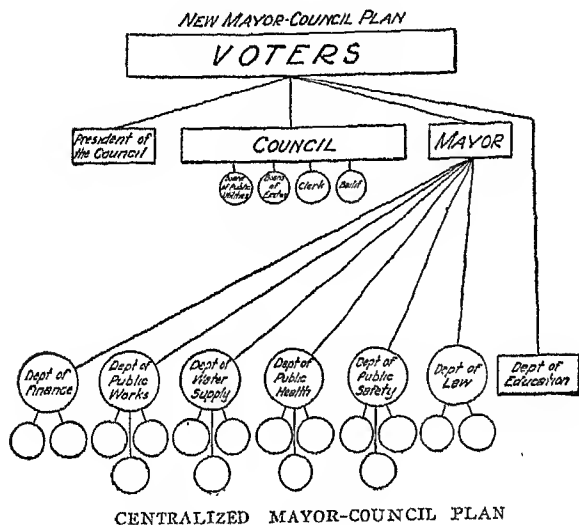
*Description*—The mayor is elected by the people, sometimes on a partisan but usually on a nonpartisan ballot, no other administrative officials being elected except perhaps the auditor or comptroller. The council is small in number, elected either by wards or at large. Confirmation by the council in administrative appointments is not required. The mayor has the veto power.

Administrative services are organized into five or more de-

partments, each headed by a director appointed by, and responsible to, the mayor.

The rank and file of city employees are usually under civil service.

*Arguments Pro*—The chief executive is elected by the people directly. He is given full control over administration. The people look to him as the leader whom they can hold responsible for poor work in any department. There is separation between



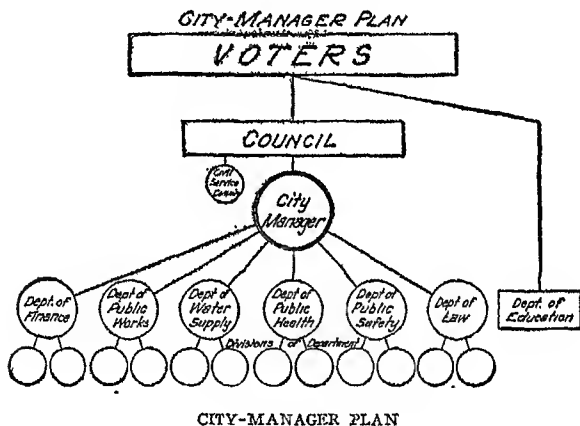
the administrative and legislative departments. Because of the short ballot the people are able to know well the candidates for council for whom they vote. The mayor cannot "pass the buck," because he has been given power sufficient to perform his promises.

*Arguments Contra*—The mayor is usually a politician elected because of personal popularity or because he stands for certain general policies or plans of public improvements. He is rarely a good administrator of the details of city business, which deserve the full-time attention of a high-caliber executive, whereas the average mayor has to spend much of his time in taking care of his political interests.

The mayor (and this is truer of the so-called independent mayor than the one who is more of a politician) comes to his work without preparation or experience in the highly specialized work of the city. He is an amateur at the head of a big business. As soon as he learns the ropes, his term expires and a new "greenhorn" is elected.

An elected mayor has to be guided by political considerations. Even the best of them have incurred campaign obligations which must be met by patronage.

The same is true of department heads who change with the mayor. The administration therefore cannot be free of politics.



#### 4. THE CITY-MANAGER PLAN

*Description*—A small council elected by popular vote on a nonpartisan ticket with functions confined to legislation. The council appoints the city manager and supervises him, instead of being active departmental executives, as under the commission form. The city manager can be removed at any time by the council. He is a full-time executive head, chosen upon the basis of experience and ability, and not because of political considerations. The work of the city is organized in departments, the heads of which are chosen by the manager. The organization is similar to that followed by successful business corporations and other associations.

*Arguments Pro*—The manager is appointed, not elected. High-grade administrative ability is not secured by election. The public are competent to pass on personalities and policies, but do not have the time to study individual fitness for an administrative post. This is best done by a small group who are intimately familiar with the job requirements and can study carefully the merits of each applicant.

City managership is now a profession, and each manager's success and his hope for promotion to a higher salary or a larger city depend upon his results, and not upon political favors or political service.

Most city problems relate to administration of city services, and a premium is put on efficiency, since the manager can be discharged at any time. This keeps him democratic and responsible to the council, who are in turn chosen by the people.

The manager is not an amateur. Many have been serving for years. Many have been called to better jobs as managers in larger cities on account of their reputation for service.

All city activities are coördinated to the best advantage under a central supervisor. There is no division of function or responsibility.

A small council being the only elected officials, the people can concentrate attention upon a few candidates and their fitness to frame policy, without being confused by administrative considerations as well.

*Arguments Contra*—The plan is not democratic, because the manager is not elected directly by the people. He may be an out-of-town man and out of touch with local sentiment. The manager has too much authority and will "put things over" on the council, or the council will interfere too much and hamper the manager. The manager cannot engage in politics, as can the mayor, and the city is therefore without any outstanding political leadership such as a mayor gives.



## APPENDIX VII

### THE STORY OF THE CITY-MANAGER PLAN<sup>1</sup>

#### STANDARD CHARTER DETAILS

The city-manager plan (or council-manager, or commission-manager plan) provides for a single elective governing board of popular representatives usually called a "council." No other elective officers. The title of Mayor is often given to the chairman of the council, but he has no veto or separate administrative powers. The council receives nominal salaries, or none, and the members give only their spare time to municipal work, and thus are left free to continue their private careers without interruption.

Their functions are to hire and supervise an appointive chief administrator, the city manager, who holds office at their pleasure; also to pass ordinances and to contribute to the city government the amateur and representative element.

The city manager, as chief executive, appoints, directs and can remove the rest of the administrative staff, subject to the usual civil service restrictions. He is not necessarily or usually a local resident. Supposedly he is an expert in matters of municipal administration. In small cities he is frequently a practical civil engineer, thereby making a separate city engineer unnecessary. In large cities broad executive experience is, of course, a major requirement. The city manager's salary is the largest in the city's service.

A logical exception to the appointive power of the city manager is a civil service commission appointive directly by the council.

*Nonpartisan ballot.* All nominations are made by petition and appear on the ballot at the primary election in alphabetical

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<sup>1</sup> Supplement to the *National Municipal Review*, February, 1921. Reprinted by permission of the National Municipal League.

order or in an order determined by lot or by rotation, without party labels. The highest names in the primary election go on the ballot at a final election two or three weeks later. If a political party indorses a candidate, the action is apt to be denounced as contrary to the spirit and intent of the charter as adopted by the people and the partisan indorsement becomes an unwelcome handicap to the candidate. Under both the old commission plan and the manager plan, the nonpartisan election feature works exceedingly well.

Several cities combine the two elections into one by various methods of which the Hare plan of proportional representation used in Ashtabula, O., and Sacramento, Cal., is considered the most promising.

*Initiative, Referendum and Recall.* Nearly all the city-manager charters include these much-discussed features, but as yet they have been little used in any of these cities. In cities, at least, these devices do not seem to have proved to be as important as their supporters assert nor so dangerous as their opponents fear. The city-manager government is so promptly responsive to public opinion that "the gun behind the door" stays there.

### *The Underlying Principle*

The reason why the manager plan averages so markedly higher in quality of government is because it is more democratic; *i.e.*, more sensitive and obedient to public opinion.

Two unusual basic features explain this superiority in true democracy, namely:

1. The "Short Ballot" principle.
2. Unification of powers.

1. *The "Short Ballot" principle* is the doctrine that only a few offices should ever be scheduled to be filled by election at any one time so as to permit adequate and unconfused popular examination of the candidates. In other democratic countries the plan of government usually calls on the people to fill just one single office on a given day, *e.g.*, member of Parliament or member of a city council from a ward. We really hold not *an* election but ten, twenty, even fifty, elections in a single election

day! Our complex American ballots frequently deserve to be labeled: "For politicians only, not for the people." The slogan of the Short Ballot movement runs "The long ballot is the politicians' ballot; the short ballot is the people's ballot."

The commission-manager charters respect this Short Ballot principle. It would be a violation of principle if the council were made so large that the typical voter was called upon to vote for more than five officers simultaneously. When the duty of making more than five selections at any one time is thrust upon the voter, the voter ceases to make an individual choice for every office and begins to fall back upon ready-made tickets prepared for him—by corruptible cliques or machines. Obviously, when the ballot thus requires more choices than his majesty, the voter, cares to remember, power gravitates away from the voters into the hands of the ticket-makers (politicians) who thus acquire opportunities which are open to great abuse. But when politics is made clear, simple and understandable by a very short ballot, the voter can protect himself—and usually he will.

In most of the cities which have thus far adopted the plan, the number of councilmen is five. In the larger cities the number can well be more than five, providing, however, that terms expire in rotation so that not too many would be chosen at any one election, or provided that the ballot, as the voter sees it, is shortened in some other way, as by dividing the city into wards, each of them electing a portion of the Council.

2. "*Unification of powers*" (the other basic merit of the manager plan) means the reposing of all power in a single place—the Council. This gives to the whole mechanism the single controlling composite mind which is essential to the success of any organism. (The mayor-and-council plan, for example, lacks unification of powers and permits deadlocks and "passing the buck," since the mayor and the council are prevented by the charter from getting together and composing their differences by so simple an expedient as the taking of a joint vote.) It would be a violation of the principles of the city-manager plan, for instance, to give to a separate mayor the

power to veto the acts of the council. It would then be a two-headed city instead of a one-headed city.

It is easier for the people to control a unified government than a ramshackle one. For example, the council in the manager plan has power to raise the taxes and hence has power to yield to a public demand for better service; but at the same time, it has power to reduce service and yield to a public demand for low taxes. It cannot say in the first case—"We haven't the money"; nor in the second case—"We can't make the administration economical." It must always accept the complete responsibility, as there is no one else on whom blame can be thrust.

### *Advantages of a City Manager*

The advantages of having a city manager are obvious to any business man. For counsel, many minds are needed; for execution, a single directing head is required. Universal business practice demonstrates this as does also the superior success which we have had with our typical public school systems where a school board does all its work through a hired superintendent.

It is essential to the plan that the city manager shall be appointive. He must be completely the servant of the council, else it cannot fairly be forced to take responsibility for his acts. He must in no way be independent of it.

Making it possible to hire the city manager from out of town not only has been helpful in getting trained service, but is highly important to the growing profession of city management. If a city manager could not look forward to similar positions elsewhere in case he is displaced or outgrows his town, a powerful incentive toward the development of personal efficiency would be lost. The fact that the city manager is not necessarily involved in local politics, or in disputes on matters of general policy, permits comparative permanence in the office of the chief administrator of the city, a most important thing to the development of a smoothly running mechanism. In all plans involving elective executives long tenures are rare. To rid us of the amateur and transient executives which our present mayors are, and to facilitate the substitution of experienced executives in

municipal administration, is enough in itself to justify the coming of the city-manager plan.

For the first time the people have gotten their own corporation into such shape that it can hold its own with private corporations in competition for competent executive talent, providing these attractive conditions: tenure for as long as the man "makes good," chance for advancement and professional reputation, and a chance to achieve things by familiar straightforward unincumbered business methods.

### *Democracy of the Plan*

A generation ago reformers exercised their wits to devise complications of governmental machinery in a vain endeavor to prevent bad government. Thereby they made government so complex and roundabout that no one but professional politicians could operate it and the rank and file of the citizenship were left almost helpless spectators. Government by a compact ruling class variously called "the politicians," "the ring," "the machine," etc., was the result. But such government by politicians is not democracy; it is oligarchy. The old idea was intended to be democratic but it didn't "democ"!

Today the winning principle is to simplify and clarify the processes of government so that everybody can and will understand and take part effectively without special attention or effort. Politics under the manager plan becomes so primitively bare and simple that there is nothing for a politician to be a specialist in. Every citizen can and does pick out his own favorite five candidates without the aid of a party label or ticket and without letting interested persons guide his pencil for him. There is no one for the candidate to appeal to but the voters; the old intermediary "machine" with its ready-made ticket has no function. The busy ordinary nonpolitical citizen who counts for so little in the old politics, finds himself exercising his full share of control in the new plan.

That is democracy and it explains why the plan works better. For the old government obeyed a party machine which was wide open to the intrusion of new members whose motives might be corrupt whereas the new government connects direct

with the masses who are usually ready to applaud and reward those who serve them well, and who at any rate are the best base to build upon.

Manager charters are usually primitively simple and short. They safely extend municipal powers in the most free-handed way. More things are done by flexible administrative rulings, and less and less by wordy, inelastic ordinances. The corporation counsels have little to do in digging up ancient ordinances or interpreting or stretching the charter. Red tape simply disappears and actions that once took weeks are attended to in a few mintues.

### *The Most Democratic Plan*

The first-thought objection to the commission-manager plan is that it is undemocratic to make its most important single official appointive instead of "directly responsible to the people by election." Democracy, however, consists in controlling public officers, not necessarily in electing them, and that way is most democratic which gives the people the surest control. The most effective way for the people to get a firm grip on the neck of the governmental organization is by sending a representative group of citizens down to city hall to see what the executive is doing, with power to fire him and get another any day of the week if he is unsatisfactory or insubordinate. Compared with that method, direct election and recall are crude, clumsy, insufficient, and relatively undemocratic.

Furthermore, a capacity in government for vigorous effective execution of policies is essential to true democracy. A policy desired by the people and obediently voted for by their representatives may yet be defeated by jelly-fish inefficiency in execution. Administration by a trained manager is therefore more democratic (*i.e.*, obedient) than by Tom, Dick or Harry.

This new government is not a cure-all. It is capable of going in the wrong direction like any other human organization. A city charter is like an automobile—nothing mechanical can be devised that will keep the owner from driving it up the wrong fork of the road. The makers must strive to make the car infallibly obedient to the steering-wheel and completely under the

driver's control. The city-manager automobile is of all kinds the one that is least able to defy public sentiment or escape popular control. It is the best make and the easiest for the general public to drive without the help of politician chauffeurs.

## APPENDIX VIII

### RAMSHACKLE COUNTY GOVERNMENT<sup>1</sup>

*By Richard S. Childs*

The average voter has a lively idea as to what he wants in the way of village or city government and National government. His theories as to what the State government ought to do are a little hazier; but in county government he rarely gets any further than a general conviction that the crowd which runs his dear old party in the county is a little better than the other bunch and that all candidates bearing the label of the former crowd shall therefore be unhesitatingly indorsed on election day.

Over all the operations of the county government lie a great pall of silence and an utter absence of public opinion. If you should attempt to poke around in this darksome cave with a lantern, you will find that as soon as your light illuminates something interesting, the flame is abruptly smothered.

There are counties which spend as much as one hundred thousand dollars a year for the publication of political piffle at an exorbitant rate.

Various cities save most of such money through the publication by the city itself of a "City Record," into which all such notices, so far as the laws permit, are inexpensively put, but a county gazette is far, far away.

The first practical steps toward the reform of county politics must usually take the shape of an attempt to buy the control of a newspaper and run it uncontaminated by public advertising patronage—a highly precarious business venture.

#### *Behind the Censorship*

Now let us lift a corner of this blanket of silence that covers county government and see what we find. The Comptroller of

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<sup>1</sup> Reprinted by permission of the author, the National Municipal League, and The Outlook Company.



the State of New York has power to send examiners to any county to investigate and report upon its financial methods. The law was a dead letter until Mr. Glynn, afterwards Governor, became Comptroller and secured an appropriation for the salaries of a few examiners. They had no difficulty in finding wanton use of the taxpayers' money in nearly every county, not with criminal intent, to be sure, but in a spirit of simple recklessness. They found irregularities in every county. After they had covered fifty-seven counties, the head of the staff said: "In not a single county examined has there been found compliance with every provision of law."

Graft in county government is just as old-fashioned as county government itself, just as much behind the times, just as lacking in modern refinement. When you enter county politics, you step back into the days of Tweed. If you protest at things you find, you get the same answer, "What are you going to do about it?" And there isn't much you can do.

### *Antiquated Standards*

The work of the county has become expert work. In the simple days of our grandfathers a man of common horse sense could run an almshouse or a county jail or a tax-collector's office or build a road, and easily achieve the primitive standards of those times.

Nowadays the proper care of the unfortunates in an almshouse, for instance, is a highly specialized and technical profession. Men and women train for such duties in special schools and make it their life-work. Even such trained social workers will find an almshouse full of unsolved human problems requiring the most elaborate study, though the honest village merchant who takes for a few years the position of superintendent of the poor would not recognize the existence of any problems at all. The untrained visitor to an almshouse sees a clean and airy building containing a varied assortment of unfortunate humanity who are being well fed and kindly treated, and he goes away with a feeling that the county administration is excellent. The social worker, however, observes epileptics without scientific care, undetected cases of feeble-mindedness,

inebriates and drug victims who are not being trained out of their habits, victims of tuberculosis without the special system of treatment which their cases require, sufferers from chronic diseases, such as heart cases, rheumatism, cancer, and the more sinister ills, cripples who could be taught a trade if there were anybody available who knew how to teach them, and aged poor whose relatives have never been adequately looked up, the system for admissions being so lax that practically the county supports any one who applies.

All this is not the fault of the superintendent of the poor; it is the reasonable result of a ramshackle system of government. The superintendent is elective; this guarantees that he will not be an expert, but a local and transient amateur. He is forbidden to use his common sense by the Legislature, which, in its complicated poor law, provides written rules for every contingency, with results that may often be pathetic or ludicrous. Admissions to the almshouse are governed by the easy personal standards of a dozen to ten dozen local officers scattered around the county, the justices of the peace and the overseers of the poor, who have authority to commit to the almshouse. The money to operate the almshouse properly must be solicited from the Board of Supervisors, who if they choose to make offhand slashes in the requested appropriation, take no responsibility for the results.

### *Amateur Penology*

Or take the sheriff's office. Did you ever hear of a sheriff who was a penologist? So the typical county jail is a horror, a school for crime and unnatural sexual vices where men who are innocent, or at least not vicious, cannot possibly remain without becoming contaminated or callous to things that at the beginning of their incarceration they find revolting.

The sheriff is commonly compensated by fees and often they run to almost fabulous figures. Efforts are made from time to time to amend the law and steer these fees into the treasury, but there is no assurance that the plan would work. Hudson County, New Jersey, tried that, and, instead of deriving a nice revenue from the sheriff's office, the county acquired an annual

deficit, for patronage multiplied and thrift declined when the fruits of economy were no longer the sheriff's private perquisites.

### *County Boundaries*

Cities change their boundaries incessantly to keep in correct adjustment with shifts of population, but county boundaries remain immutable as they were a hundred years ago, except when one county is divided into two in order to make an extra set of jobs. That is the way Bronx County was erected within the boundaries of the County of New York. Bronx set up in business separately at a new expense of \$700,000 a year, but the expenses of the remaining half of the county continued undiminished.

The most offhand study of the county map in any State will disclose many misfits. The county seat is often remote from the center of the county, perhaps down in one corner. Often it is in a little village far from the main routes of modern transportation. Sometimes the county will straddle a mountain range or will in other ways attempt to ignore topography. In numberless cases the counties are too small in size or in population to be economical and could save a large part of their annual expenses by consolidation. Yet it never seems to occur to anybody to work for a readjustment and modernization of county geography.

### *Misfit Uniformity*

The same spirit of complacent stagnation permits the inflexible framework of government which took its present shape amid the simple conditions of seventy years ago to remain uniform for all kinds and shapes of counties, regardless of differing conditions. One great county has a trifling population scattered over an immense territory, another county may consist of a compact group of little villages, a third will be coextensive with a city government, while another is half metropolitan and half rural, and the framework of county government is identical for all of them.

Any form of organization which attempts to be a common

denominator for so many different types of counties ought to be primitively simple, a mere skeleton, and a model so far as it goes. But the framework of county government as laid down in the written law is no skeleton. A diagram of it looks like a ball of yarn after the cat has got through with it.

In its form of organization the typical county is ideally bad. It is almost completely disjointed. Each officer is independent of all the rest, standing on his own separate pedestal of popular election with a full right to tell all the other county officers to go to glory. It is like an automobile with a separate motor at every wheel, each going its own gait.

Nominally the board of supervisors (or commissioners) is at the head of the county because it holds the purse-strings; but the power of the purse is only partial, inasmuch as a multitude of laws fastens various charges upon the county and sets the salaries of a great many of its subordinate officers. Practically the board's only power consists of an ability to hamper the other elective officials by making restricted appropriations. It has no other real power to supervise them or to compel them to expend the appropriations with care and discretion.

Even if they had the power, the board of supervisors is not properly organized or equipped to handle such a task. The running of a county is a complex administrative problem, requiring incessant and active supervision; but the supervisors meet only at stated intervals, quarterly or monthly, for instance, and are in no position to keep continuous oversight over affairs. Frequently the board is too large to be anything but a debating society, anyway.

### *Patchwork Legislation*

So the State Legislature steps in, and every time one county official is impolite to some other county official somebody takes the train to the capital and a new law is passed to rectify the difficulty. In effect these interminable minute memoranda, called laws, lay down the office rules of county government and attempt to decree fraternal love among county officers. Witness the plea, made on behalf of the sheriff of Rensselaer

County, exhibited in the title of the following bill, which passed the New York Legislature of 1915:

"An Act providing for the appointment by the sheriff of Rensselaer County, of an under sheriff, jailers, watchman, matron, cooks, janitors, process servers, firemen, and court officers, and for their compensation and duties."

Perhaps the supervisors had been stingy, perhaps the sheriff's ideas were extravagant, but the point is that when under the present system two branches of the county government disagree, this ridiculous spectacle of the State Legislature solemnly enacting a law settling the salary of the cook of a certain county jail exhibits the typical method of relief. This endless legislative tinkering, even if it were always sincerely done, serves its temporary purpose, remains unrepealed and forgotten on the statute books, and becomes a permanent nuisance. The usual remedy, if a county officer fails to come up to these written requirements, is some kind of a mandamus proceeding or action by the district attorney against the county officer or his bondsman.

A county official is lucky if he has a really clear idea of what his own duties are. The much patched and often contradictory statutes which are supposed to govern his administrative procedure in detail are scattered through from three to twenty different general laws. As a rule he is no lawyer, and if he undertook the research his term might end before he was ready for business. Accordingly tradition becomes the guiding star of every county officer, for no matter how slight and innocent a variation he may make from precedent in the interests of efficiency, he is liable to find that he is violating some unheard-of statute. Many of the laws are out of date, anyway, and county officials, revolting at the senseless red tape, often disregard them for the sake of the taxpayers. That is why every student of county government soon finds that the laws in the library give him an incorrect idea of what county officials are doing.

### *Obscurity and the Long Ballot*

No one can peer into the cobwebs of county government without developing the deepest sympathy for the many conscientious

and unappreciated public servants who are trying to operate the present antiquated mechanism. The same obscurity which protects the crook also prevents good work from being rewarded. Theoretically the public official who does his duty will be promptly supported by public opinion, but the fact is that the people of the county know very little about his official conduct, and if he comes in conflict with some other officer, the people, who constitute his only court of appeal, are in no position to determine the merits of the controversy. There are so many officeholders to watch that public opinion is baffled and ends by keeping track of almost none of them. The voter has four National officers to select, a dozen State and judicial officers, and a string of townships and village or city officials, anywhere from thirty to a hundred altogether, to be elected in the course of a four-year cycle. What chance has this or that county officer to get into the spotlight where his good deeds may be appreciated? He is only one of from two hundred to fourteen hundred officeholders who are elective in the county. He is lost in the shuffle. The people of the county may happen to be familiar with his personality—in rural counties they often are—but there still remains the impossible task for them to keep track of his *official* activities and appraise his work, which, of course, is largely technical. The county clerk in New York, for example, is elected. It is therefore presumably the duty of the people, and of no one else, to see that he performs his duty under the penal law, banking law, lien law, executive law, tax law, fish, forest, and game law, prison law, liquor tax law, domestic relations law, partnership law, public officers' law, general business law, judiciary law, real property law, legislative law, town law, decedent estate law and county law!

### *Violates Short Ballot Principles*

County officers, except the governing board, are not in any proper sense representative officers, and democracy gains nothing by keeping them in politics. There is no legitimate Republican way or Socialist way of being county clerk or superintendent of highways. A member of New York's last Constitutional Convention argued that when the people elected a

Republican to build the roads they thereby ordered all the jobs to be transferred to Republicans, making the roads all good Republican roads. But he was mistaken. Political science—there is such a thing but no true American will respect it—teaches that no technical office should be elective; none, in fact truly representative offices where the function is to interpret public opinion. Members of the Legislature, Congressmen, aldermen, and county supervisors (or whatever you call them in your State) should be amateurs, spokesmen for the people, samples of the ignorance as well as of the enlightenment of the voters, and from them all the others, the experts, should take their orders.

That is the pathway toward efficiency and economy.

But it is also the pathway toward the bigger goal of a real democracy that will “democ.” Bossism is not democracy. Ring rule is not democracy. Government by a ruling class called “the politicians” is not democracy. And county government is not democracy—it doesn’t “democ.”

County government, on the contrary, is ideally designed to *resist* popular control. One way of concealing a public officer from effective public scrutiny is to make his office so *small* that it will inevitably fail to command public attention. A second way is to have so *many* elective officers that the public cannot possibly keep track of them all. A third way to baffle the public is to *divide the responsibility*, so that each public officer under attack can excuse himself on the ground that the necessary co-operation of some other officer was lacking. County government involves the liberal use of all three of these expedients; and so, in spite of its superficial aspect, the county is the least democratic of all our political divisions.

Indeed, it is a standing menace to democracy. The unorganized citizenry cannot operate the present complex, rusty instrument. By always requiring a greater amount of popular participation in government than the citizens are willing to furnish, it removes itself beyond the grip of the rank-and-file voters and lapses into the hands of the political machines. If the citizens of a given county want to displace the dominant political machine, they can do so only by the expedient of building up

another machine to supplant it, and the new machine, like the old one, will continue to be the real guiding force in county affairs, selecting the public officers and telling them what to do. In fact the private political machine, simple, well unified, and efficient, but powerless to resist the intrusion of corrupt men, has often been the one element of strength to the official county government by compelling some degree of harmony among the latter's disorganized elements.

### *The Prospect of Progress*

County reform is in its infancy. There is no State in the Union which has worked out a good system.

A satisfactory solution of the many problems can be worked out only by a steady process of evolution, under conditions that give scope for experiment, free from needless Constitutional restrictions. In only four States (California, Nebraska, Maryland, and Louisiana) are counties free from constitutional entanglements. New York voted in November, 1921, to give freedom to the counties of Nassau and Westchester adjoining New York City, and new county government may be created there in 1923. The counties must be free to advance individually and not in perpetual lockstep. Let the more progressive counties feel their way cautiously forward, to be followed by the others when the value of a given step is clearly proved by experience.

The path of progress will surely be in the general direction of unification and simplification. Some of the elective officers must be transferred to the appointive list, and those who remain elective must be built up in power, influence, and conspicuousness until they command the discriminating attention of the electorate. The ballot must not continue to be too long to remember, but must be shortened sufficiently to come within the complete oversight of the voters. Responsibility must be clearly located. The county must be given a definite head. The limbs and the body must be joined together and put under the easy control of a brain. Not otherwise can the people of a county secure an organism that will be an effective and obedient servant.

California took a hopeful step in 1913 by allowing its counties



to draw up charters of their own just as the cities did. Several counties have taken advantage of the opportunity, Los Angeles County in particular making the notable improvement of getting thirteen officers off the elective list, and making local politics notably simple and more popularly understandable.

County government is the uttermost citadel of our political overlords, the one base of supplies from which they are never ousted. But its very rottenness as an institution guarantees that when it once starts to crumble it will go swiftly!

## APPENDIX IX

### PROBLEMS OF RURAL GOVERNMENT<sup>1</sup>

For purposes of analysis, the problems of rural government in the United States—and indeed of government in general—may be grouped in several divisions. There are problems of functions—the objects or ends to be attained or the work to be undertaken by public or governmental agencies. There are problems as to the areas or districts best suited for carrying on the desired public functions. There are problems as to the organization and relations of the governmental machinery. And there are problems of citizenship, connected with the activities of citizens and voters to the local government and its work.

These groups of problems, however, are not to be considered as independent and disconnected. They are mutually dependent and interrelated; and a brief examination of each group may be considered as different cross sections of the same subject matter, cut through different dimensions, and to be studied from different points of view. By such a method of analysis the nature of the problems as a whole and their mutual interrelations may be more clearly understood.

#### *Functions of Rural Government*

The scope of public or governmental functions in the rural country has always been less than in the more compact urban sections; and the great development of governmental activities during the last half century has been mainly in connection with urban communities in the case of both municipal functions and the functions of state and national governments. Rural conditions have changed less strikingly and have remained less

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<sup>1</sup> Report of the Committee on Rural Government of the American Country Life Association, John A. Fairlie, chairman. Reprinted by permission of the Association from *Proceedings* of Fourth National Country Life Conference, 1921, pp. 21-27.

complex than urban conditions; and while they have been changing in no small degree, the relatively slower rate of change has made them seem more nearly stationary. Perhaps mainly as a result of this, political conditions in the rural regions have until very recently remained substantially as they were fifty years ago. This may be indicated by noting that county taxation in Illinois showed no increase from 1870 to 1900; and that the increase since then has been less than that in distinctly urban municipalities, and has indeed been mainly in Cook County which contains the metropolitan city of Chicago.

Thus local government in the rural areas has consisted for the most part in the administration of justice, the maintenance of primitive roads, the support of small elementary schools with some provision for poor relief; and such functions have continued to be carried on in much the same way and on about the same scale as before and immediately after the Civil War. Such changes and improvements as took place were for the most part due to increased activity on the part of state governments, by grants for schools and the development of state educational and charitable institutions rather than by growth in the activities of local agencies.

In recent years, however, there have been more rapid changes and developments, partly by the further increase of state activities, but in part at least by the action of local authorities, and by the creation of new local districts and authorities. Moreover, the new movement for the improvement of country life aims at securing for the rural sections of the country many of the economies and social advantages of city life. This may be done in part by means of voluntary private organizations. But, as urban improvements have been brought about in large part through the action of the municipal governments, so the improvement in rural conditions will depend to no little extent on the activities of rural governmental agencies.

Thus there is a steadily growing recognition of the need for public action for the improvement of rural economic conditions. The construction of good roads already actively under way in many states, by state and national grants for the more important highways, can only be made general through the action of local

agencies. The improvement of methods of agricultural production, now promoted by the national and state governments, can be most effectively extended throughout the country by the active coöperation of local authorities. The development of marketing agencies, coöperative buying and selling and credit facilities may also be promoted by the assistance of local officials.

In the broader field of social welfare, more is being done than formerly, and still more is being urged and demanded for the rural parts of the country. The elementary rural school with one or two teachers is no longer accepted as satisfactory; and graded schools are increasing and should increase more rapidly. The need for more effective sanitary regulations for the protection of public health and the application of preventive medicine in rural sections is being more clearly recognized and should be further extended. Better methods for the care of the sick and defectives, dependents and delinquents are clearly needed. And there is also a growing demand for furnishing police protection and facilities for recreation in the country as well as in the city.

Improvements are being made in these directions; and much more may be done through the present agencies of local government, by active and progressive officials. But if far-reaching developments are to take place along such lines as indicated above, there is an essential need for important changes in the machinery and methods of rural government. The agencies established to meet the simple needs of earlier times are clearly inadequate and so defectively organized as to be incapable of undertaking satisfactorily these additional functions. If, therefore, the improvement of country life in these directions is to be made possible, a necessary prerequisite is the revision and reorganization of rural government, so that it may be able to handle such problems.

### *Rural Areas*

In the United States there is a large variety of local areas, and nothing like an approach to a general agreement as to the bases on which such areas should be determined. The variety of districts in each state present a complicated network of

overlapping areas; while for some states and for the country as a whole the political\* geography presents a confused chaos which almost defies clear and intelligent analysis. Leaving aside the administrative districts of the national government, there are within the several states legislative and judicial districts, counties, towns, villages, boroughs, and cities, and a host of special districts for particular purposes, which have been formed with little reference to each other, with overlapping and interwoven boundaries and jurisdiction.

Amid this confusion of political areas, there are a few common elements of fairly general application. In every state there are local districts known as counties (except in Louisiana, where the corresponding areas are called parishes). In every state there are urban districts called cities, and smaller semi-urban districts called villages, boroughs or incorporated towns. In every state there are other districts smaller than the county which are for the most part rural in character, such as the New England towns, the townships of the Middle Atlantic and North Central states, and districts for special purposes in the Southern and Western states. In addition there are in nearly every state large numbers of other special districts, some urban, some rural, and some of a mixed character.

But the most common districts of the same name represent areas of widely different character, even in the same state, and much more in the country as a whole. There are more than 3,000 counties in the United States, ranging in area from 24 square miles (Bristol County, R. I.) to 20,000 square miles (San Bernardino County, Cal.); and from less than a hundred to nearly three million population. The average county area is about 1,000 square miles, and the average population is about 30,000. But then averages are misleading; and the typical county has about 600 square miles and about 20,000 population. In different sections of the country, counties differ to a considerable extent. In New England, county areas are somewhat larger and population much larger than the typical county. In the Southern states, counties as a rule are smaller both in area and population than the typical county. In the Western states, most counties are much larger in area, but smaller in population

than the typical county. Even in the same state, the variations are often great. In Illinois, counties vary in area from about 200 to more than 1,000 square miles; and omitting Cook County, they range in population from 7,000 to more than 100,000.

Many state constitutions contain provisions as to the minimum area for new counties; and these provisions, dating for the most part from about 1850, indicate some consensus of opinion at that time as to the convenient area. Most of the provisions fix an area in the neighborhood of 400 square miles; but even in states with such provisions, there are found a number of counties smaller in area, established before the constitutional provisions were adopted.

It may be surmised that the area of 400 square miles represented a district in which, with the roads and animal transport of the time, it was possible to go from any part of the county to the county seat near the center, transact business, and return within a day. Nowadays, with motor cars and improved roads, it seems obvious that a much larger area would be equally, and perhaps more, convenient. Those who have investigated the working of county government are agreed that most counties, even of the typical size, constitute a district too small, both in area and population, for effective administration alike of the older functions and the proposed new county functions. Some have concluded from this that the best solution would be the abolition of the county. But the general experience of this and other countries indicates the need for local districts smaller than the American states (except perhaps in Rhode Island and Delaware) for purposes of both state and local administration. In other countries, however, the districts which correspond most closely to the American county (such as the county in England and the department in France) are usually larger in area and much larger in population than the typical American county.

Not only are most counties in most of the states too small in area, the existing boundaries have little reference to either geographic, economic, or social factors. County lines have for the most part been established before the country was well settled; and in most of the states east of the Mississippi River, the

county boundaries remain now as fixed before the Civil War. Except in the older seaboard states, counties are usually marked off by straight line boundaries, with little reference to topographic conditions, which determine the lines of communication. With the progress of settlement and the development of railroad transportation, the county areas have become less and less adjusted to the centers of trade and social activity.

About two-thirds of the counties at the present time are distinctly rural areas, in which the largest village or city has less than 5,000 population, and often less than 2,500. Almost a fourth of the counties include a city of 5,000 to 25,000 population, and other villages, but with a considerable proportion of rural population. In about one-twelfth of the counties, the urban population distinctly predominates.

In view of these considerations, it may be urged that, accepting the county as a permanent local area, there is need in most states (and especially in the Southern and North Central states) for revising the county areas, consolidating the smaller counties, so as to form counties suitable in area and social interests to meet the conditions of the present time.

For such a revision of county boundaries, the main emphasis should be laid on economic and social factors, so as to recognize and encourage the development of communities with a common social life. This will be affected by geographic elements, such as hills and rivers; and by transportation lines, and trade centers; but some attention should also be given to historical connections in the past. No hard and fast limits as to area, and still less as to population, can be named; but for the most part larger areas than the present will be most suitable; and it may be suggested that, except for distinctly urban communities, an area of 900 to 1,000 square miles may be taken as the standard. Counties of this size will usually contain a city of at least 5,000 population.

It must be recognized, however, that a general revision of county lines will be made only by slow stages. There are constitutional provisions in many states which will stand in the way. The inertia of tradition, political habits and party organization will oppose changes in established boundaries even

when legal obstacles are removed. More progress will probably be made by changes wherever local sentiment is favorable than by undertaking a complete recasting of the existing areas over a whole state at once.

With regard to local rural areas smaller than the county there is a still wider divergence throughout the country than in the case of counties. New England towns remain active and vigorous local units though there is some criticism of town government, and to some extent special districts are being formed within the towns. The township of the Middle Atlantic and North Central states is of much less and declining importance; and villages and special districts for particular purposes are more numerous. In the Southern and Western states villages and special districts exist in great variety.

It has been suggested that, except for villages and cities, all functions of local government might be consolidated in the county, with provision for special assessment (and perhaps other) districts for administrative purposes, but without a distinct local autonomy. But the universal prevalence of rural units smaller than even small counties, reflects a widespread need, and the problem is rather to choose between an unorganized series of overlapping special districts and a system of consolidated local communities. The New England town represents the latter ideal; but it has not proven successful as applied to the artificial township areas of the Middle West, and the attempt, following the Civil War, to establish a general system of this kind in some of the Southern states, failed even more completely.<sup>2</sup>

Nevertheless, the opinion of most systematic students of government and of those actively interested in the country life movement (including those in the Southern states) agree in believing that consolidated community government is to be preferred to overlapping and legally disconnected special districts.

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<sup>2</sup> Moreover, the New England rural towns are too small for the most effective performance of certain functions, such as school supervision, and under present conditions are too small for the most economical government in other respects. They are burdened with too many officials and governmental machinery that could serve a larger area without added cost.



At least, it seems clear that such legislation as that of North Carolina providing for the voluntary formation and incorporation of rural communities with a considerable scope of local powers is to be encouraged. Such communities, including villages as trade and social centers, and dealing with a number of local problems, may be expected to develop an active political consciousness, which is impossible in such artificial areas as the congressional township or in special districts dealing with single subjects.

### *Rural Organization*

In the existing machinery for rural local government the most general defect is the complicated variety of local officials and the lack of any definite and coherent system of organization. In county government, this is shown in the number of officials independent of each other and the lack both of any concentrated executive control and of an adequate representative council with substantial powers of local legislation. For areas less than the county, the confusing number of overlapping districts and petty officials is another phase of the same situation. State supervision over local officials is also exercised spasmodically and without any coherent plan, and is clearly inadequate even in the case of officers who are most distinctly state agents for the local administration of state affairs.

These conditions have been perhaps tolerable in the past when population was widely scattered and public activities were of little importance. But in the present stage of rural settlements in most parts of the country and with the increasing scope of governmental functions and the demand and need for further expansion in the fields indicated, the problem of an effective organization of rural government becomes more and more important, and as already noted is essential if proposed extensions of public activities are to be undertaken with any hope of success.

It must be realized, however, that no detailed plan and chart of organization for rural government can be worked out which will be equally applicable to all parts of the United States. Different conditions and existing institutions must be taken

into account; and the definite provisions must be worked out for each state; and to some extent adjusted to varying conditions within the states. This may be secured by provisions for county home rule charters, as in California and Maryland; but in most states more progress may be looked for by providing optional plans of county government, as has been authorized by the new Louisiana constitution, and approved by the Illinois constitutional convention.

It is possible, however, to indicate some of the fundamental principles which should be followed, and to suggest some of their applications. The essential elements which should underlie any effective organization of rural government are those of simplicity and responsibility. The present confusing chaos of authorities and agencies should be reduced to simpler terms; and the line of responsibility should be clearly determined.

In the field of county government, these considerations call for a reduction in the number of elective county officials, the establishment of a single responsible executive control, effective supervision over local officials in the performance of state functions, and the creation of a local representative authority for controlling local policies and local finances.

It is believed that for the local representative authority in the county, there should be a council, in most cases of five to seven members, with control over county taxes and finances and the determination of questions of policy and local legislation, but without the detailed administrative duties now imposed on county boards. Such county councils may be elected by districts, or if elected at large should be chosen by some plan of voting which will secure representation of different interests.

For the chief county executive, there is much to be said for applying the principle of the city-manager plan and providing for a county manager, selected by the county council. But it will perhaps be easier to bring about the needed concentration of executive authority in one of the existing officials. Tendencies in this direction now exist in the case of the county or probate judge in some of the Southern states (Georgia and Alabama), and with other officials in other states (as the county clerk in Illinois, or the president of the county board in Cook

County). In several counties in North Carolina the chairmen of the county boards have been made full time salaried officers and act as county managers; and other counties have county managers.<sup>3</sup>

As a means for securing responsible supervision over the performance of state functions, it is believed that the states' attorney or public prosecutor should be appointed by the governor as the principal agent for the local enforcement of state law. Other executive and administrative officials should be appointed. For counties including large cities (of over 100,000), the consolidation of city and county government should be made possible.

For rural districts smaller than counties, the most important need is the consolidation of overlapping districts into community areas, in which various functions may be combined in one group of public authorities. Here, too, there will be need, in most cases, for a small local council and a chief executive, but in small rural communities the executive should be a local leader rather than a professional expert manager. If the number of such districts in a county does not exceed the number of members in the county council, the latter may well be composed of the chief officials of the community districts, as in the county boards under the supervisor plan of township-county government. The open town meeting of voters may well be continued wherever it is active and effective; and may be authorized to be established where local conditions warrant; but should not be established or continued where its usefulness is not felt.

Both in counties and the smaller rural communities there is need for active coöperation between public officials and voluntary organizations for economic and social purposes. Farmers' associations and school boards should be able to unite on plans for agricultural education; and coöperative action may also be carried on in such matters as citizenship, sanitation and public improvements.

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<sup>3</sup> Commissioner Chairman Manager in Rockingham (1913), Richmond (1913), Buncombe (1917) and Mecklenberg (1919) counties; County Managers in Catawba and Caldwell counties (1917).

There is further need for a definite system of reports by such local authorities to the state authorities, presenting brief but intelligible statements of finances on a uniform plan, and also other records. Uniform systems of local accounts and a regular state audit of local accounts are desirable; but the primary need is for a satisfactory system of reports as to local finances and the work of local governments.

### *Rural Citizenship*

Whatever may be done in the way of readjusting local areas, reorganizing the machinery of rural government, and extending the legal powers and functions of the local authorities, the successful working of any system of rural government will depend on an active and intelligent body of citizens. For this purpose there is need for more systematic and organized efforts to arouse and strengthen an educated interest in local public affairs in rural communities. There should be in such regions, as well as in cities, local civic associations or leagues dealing with local problems on their merits and taking an active part in the selection of more capable and progressive local officials.

A phase of such work of special importance at this time, with the recent extension of voting rights to women, is the development of organized work in citizenship among the women in rural sections. Courses of reading and study in citizenship and rural problems should be formulated, suitable for the use of women's clubs, extension schools, and other agencies; and also for civics classes in rural high schools; and steps should be taken to distribute outlines and suggestions for such courses through such organizations as the League for Women Voters and publications such as the *Woman Citizen*.

Another important field for training in citizenship in rural districts, as well as in urban, is for those who have recently come to this country from other lands. The problem of the Americanization of these from abroad is not limited to the cities; but exists also in many rural parts of the United States. For this work, too, special courses and special methods need to be planned; and systematic work must be done to secure their introduction and continuation where needed.

There is also need for more attention to rural government in the rural schools and also in high schools, colleges and universities, not only in the general courses on government and citizenship but in the larger universities special courses on rural government should be given as well as those on municipal government and city affairs.

In connection with the various phases of training in citizenship, civics or Americanization, attention should be called to certain dangers in a good deal of the work being done under these terms. On the one hand there is a tendency towards the dissipation of energy, by attempting to cover the whole field of sociology, economics and ethics in a brief survey course, with little or no consideration of the problems of government and the relations of citizens to such problems, which should form the essential element in any course in citizenship. On the other hand there are efforts in some quarters to direct work in Americanization in the interest of reactionary conservatism and to stereotype the political and economic ideas of the middle of the nineteenth century as the final word in these fields.

It is not possible within the limits of any general course in citizenship to discuss all the problems of a public nature; nor is it the function of any such course to carry on any form of social, economic or partisan propaganda. The fundamental task is to emphasize the mutual interests of all citizens in community and public problems, and to develop an intelligent consideration of such problems.

# INDEX

- Absent voting, 101.
- Accounting methods, state, 326*ff*.
- Accounts, state supervision of local, 325*f*.
- Administration, forms of control over, 248*ff*.
- organization of the, 242*ff*.
- Administration of charities and correction, 403*f*.
- Administration of education, 398*ff*.
- Administration of labor laws, 394*f*.
- Administrative action, judicial review of, 489*ff*.
- Administrative agencies, consolidation of, 289*ff*.
- Administrative centralization, 397.
- Administrative control over cities, 507*ff*.
- Administrative decentralization, 257.
- Administrative disintegration, state, 268*f*.
- Administrative officials, selection of, 293*f*.
- Administrative powers, governor's, 228*ff*.
- Administrative reorganization, 283*ff*.
- Administrative reorganization and the budget system, 287.
- Administrative reorganization in Illinois, 605*ff*.
- Administrative services, 397*ff*.
- Admission of states into the Union, 7*ff*.
- Advisory opinions, 458.
- Amendment, constitutional, by popular initiative, 48*f*.
- Amendments, constitutional, 44*ff*, 542.
- Anti-alien land law in California, 26.
- Appellate courts, 442.
- Appointment, governor's power of, 230*ff*.
- Appointments, governor's, confirmation of, 232*f*, 293*f*.
- Apportionment of members of the legislature, 153*ff*.
- Appropriations, continuing, 340, 568.
- lump-sum, 333*f*.
- Arbitration of commercial disputes, 496.
- Assessment of property, 306*ff*.
- Assessments, state supervision of local, 312*ff*.
- Assessors, tax, 311*f*.
- Attorney-general, state, 414*ff*.
- Attorneys, local prosecuting, 418*f*.
- Australian ballot, the, 103*ff*.
- Ballot forms, 103*ff*.
- influence of, 133*ff*.
- Ballot, the short, 122*ff*, 591*ff*, 625.
- Banks, regulation of, 351*ff*.
- Bar associations, nomination of judges by, 448*f*.
- Bar, organization of the, 441*f*.
- Bicameral system, the, 146*ff*, 548.
- Bill of attainder, 55.
- Bill of rights, 32*ff*, 519*f*.
- Bills, approval and veto of, 222*ff*.
- introduction and passage of, 187*ff*.
- Blue-sky laws, 348*f*.
- Boards and commissions, powers of, 262*ff*.
- special counsel for, 417.
- state, creation of, 260*f*.
- supervision over, 234.
- Boards of control, state, 404*f*.
- Board system, the, 297*f*.
- Board, the county, 513.
- Boards *v.* single commissioners, 265*ff*, 291*ff*.
- Boss, the, 196.
- Boycotts, 388*f*.

- Budget, preparation of the state,  
335.  
— the, in Illinois, 337f.  
— the, in Maryland, 336f.  
— the state, 286f., 331ff., 530ff.,  
563ff.
- Campaign expenses, 102f.  
Candidates, nomination of, 95ff.  
Cases, civil and criminal, 459.  
Caucus, legislative, 195.  
Centralization, administrative, 397.  
Charities and correction, adminis-  
tration of, 403ff.  
Charters, municipal, 502, 505.  
Chief justice, the, 439f.  
Child labor, regulation of, 373f.  
Circuit courts, 434f.  
Cities, administrative control over,  
507ff.  
— civil service in, 274.  
— classification of, 503f.  
— enforcement of law in, 424.  
— home rule for, 505ff.  
— indebtedness of, 507.  
— judicial control over, 509f.  
— legislative control over, 501ff.  
— liability of, for torts, 509.  
— powers of, 500f.  
— special legislation for, 502.  
Citizenship, rural, 651.  
City charters, 502, 505.  
City councils, 510f.  
— election of, 204f.  
— unicameral, 148.  
City government, commission form  
of, 206f., 511, 619.  
— commission-manager plan of,  
207, 512, 622, 624ff.  
— forms of, 510ff., 617ff.  
City-manager form of government  
for states, 285.  
City police, state control over, 508.  
Civil service, 269ff., 541.  
— promotions in, 275.  
Civil service commission, 277f.  
Civil service employees, removal of,  
276.  
Civil service reform, 272f.  
— newer aspects of, 279.
- Classification of objects of taxa-  
tion, 322ff.  
Clemency, executive, 475ff.  
Closed primary, the, 113ff.  
Collective bargaining, 387ff.  
Commerce, regulation of, by states,  
54f., 356ff.  
Commissioners, single, *v.* boards,  
265ff.  
Commission form of city govern-  
ment, 511, 619.  
Commission government for states,  
285.  
Commission-manager plan of city  
government, 512, 622, 624ff.  
Commissions, public service, 362f.  
— state, 259ff.  
— — creation of, 260f.  
— — powers of, 262ff.  
Committees, conference, 193f.  
— joint, 193.  
— party, 92ff.  
Committee system in legislatures,  
190ff.  
Common law defenses, 383.  
Common law, development of,  
455f.  
Compacts between states, 21.  
Conciliation of civil cases, 496.  
Constabulary, the state, 425f.  
Constitutional amendment by pop-  
ular initiative, 48f.  
Constitutional amendments, 44ff.  
Constitutional home rule for cities,  
505ff.  
Constitutional limitations on legis-  
lative control over cities, 502ff.  
Constitutional revision, 40ff.  
Constitution-making power, 51.  
Constitution, model state, 519ff.  
Constitutions, state, 29ff.  
— contents of state, 32ff.  
— development of state, 31.  
— original state, 30.  
Contract, freedom of, 379.  
Contracts, impairing the obligation  
of, 57, 69, 345f., 500.  
Control, state boards of, 404f.  
Conventions, constitutional, 39ff.  
— nominating, 96f.  
— party, 91f.

- pre-primary, 117.
- Convict labor, 391*ff.*
- Corporations, foreign, 350*f.*
- state regulation of, 344*ff.*
- taxation of, 316*f.*
- Correction, administration of, 403*ff.*
- Corrupt practices laws, 102*f.*
- Councils, municipal, 510*f.*
- Counties, 499, 541, 574*ff.*, 631*ff.*, 644*ff.*
- County courts, 434.
- County government, 513*f.*
- County representation in legislature, 159.
- Court of industrial relations, Kansas, 390*f.*
- Courts, circuit, 434*f.*
- county, 434.
- historical development of state, 429*ff.*
- jurisdiction of state, 442*ff.*
- municipal, 434.
- organization of state, 433*ff.*
- powers of, 457.
- probate, 434.
- reform of the, 491*ff.*
- rulemaking power of, 495.
- Courts and unconstitutional laws, 482*ff.*
- Courts in metropolitan areas, 493.
- Courts in model state constitution, 531*ff.*
- Courts of equity, 443.
- Court, state supreme, 435*ff.*
- Criminal cases, procedure in, 460*ff.*
- Criminal justice, 611*ff.*
- Criminal law and pardons, 476.
  
- Dartmouth College case, 345*f.*, 500*n.*
- Debate in legislatures, limitation of, 188.
- Debts, municipal, 507.
- state, 304*f.*
- Decentralization, administrative, 257.
- Declaratory judgments, 496.
- Defense, state councils of, 17.
- Democracy, newer institutions of, 110*ff.*
- progress of, 73*f.*
- Department of justice, state, 414*ff.*
- Departments, interdependence of, 38.
- Direct legislation, results of, 137*ff.*
- Direct primary, advantages and defects of, 119*f.*
- Direct primary election, the, 110*f.*
- Dorr's rebellion, 13.
- Dual system, the, 405*f.*
- Due process of law, 34, 56, 67, 484.
  
- Education, administration of, 398*ff.*
- Educational institutions, state, 402*f.*
- Eighteenth amendment, enforcement of, 16, 65, 71, 426.
- Election, the direct primary, 110*f.*
- Election officials, 99.
- Election of officers, popular, 76*f.*
- Elections, conduct of, 97*ff.*
- number and expense of, 101*f.*
- Emergency measures, 135*f.*, 184.
- Eminent domain, 34, 56*f.*
- Employer's liability, 382*f.*
- Enabling act, Congressional, 8.
- Enforcement of state law, 413*ff.*
- Equalization of taxes, 310*f.*
- Equal protection of the laws, 56, 68.
- Equity, courts of, 443.
- jurisprudence, 456*f.*
- Executive council, the, 243*f.*
- Executive departments, heads of, 231*ff.*, 244*ff.*, 246*ff.*, 254*f.*, 286, 558*ff.*, 562.
- Executive in model state constitution, 528*ff.*, 553*ff.*
- Expenditures, state, 329*ff.*
- Ex post facto* laws, 55.
- Extradition of fugitives, interstate, 22.
  
- Federal system, the, 3*ff.*
- Fee-collecting agencies, 340.
- Fifteenth amendment, the, 78*ff.*
- Financial powers, state, 52*ff.*, 177*ff.*
- Foreign relations, the states and, 24*ff.*
- Fourteenth amendment, enforcement of, 78.



Franchise, the indeterminate, 363.  
 Full faith and credit clause, 21.  
 Funds, custody of state, 328.

Gerrymandering, 155.

Governor, and heads of departments, relations of, 246ff., 254f.

— and law enforcement, 229f., 422.

— and legislature, relations between, 284ff., 551ff., 555ff.

— and special legislative sessions, 218ff.

— and the state budget, 332.

— appointment of judges by, 449f.

— colonial, 142f.

— compensation of, 215.

— election of, 211f.

— initiative of, in legislation, 148, 200f., 220ff., 228.

— in model state constitution, 528ff., 553ff.

— messages of, 220f.

— powers of, administrative, 228ff.

— appointing, 230ff., 293f.

— legislative, 216ff.

— military, 239ff.

— pardoning, 475ff.

— removal, 295f., 234ff.

— supervision, 233f.

— veto, 222ff., 227, 287.

— qualifications of, 213f.

— recall of, 128.

— reëligibility of, 214f.

— successor to, 216.

— term of, 214.

— under first state constitutions, 144.

Governor's appointments, confirmation of, 232f.

Governors, conference of, 23.

Governor's item veto, 223f.

— his power of reducing items, 223f.

— repassage of bills over, 225f.

Governor's recall, 297.

Governor's responsibility, 296.

"Grandfather" clause of Oklahoma constitution, 82.

Grand jury, indictment by, 461.

Grants-in-aid, system of, 71.

Health administration, public, 460ff.

Health officers, local, 408.

Home rule and law enforcement, 419ff.

Home rule, constitutional, 165.

Home rule for cities, 505ff.

Impeachment proceedings, 177.

Independence, Declaration of, 74f.

Indeterminate permit, the, 363.

Indeterminate sentence, the, 472f.

Indiana ballot form, 108.

Industrial disputes, settlement of, 389ff.

Industrial relations, court of, 390f.

Initiative and referendum, 128ff., 165, 525ff.

— results of, 137ff.

Initiative, constitutional amendment by popular, 48ff.

Injunction and abatement law, 413, 470f.

Injunctions in strikes, 388.

Institutions, state educational, 402f.

Insurance funds, state, 385f.

Insurance, regulation of, 351ff.

Interstate citizenship clause, 20.

Interstate relations, 20ff.

Jeopardy, double, 463.

Judge, relation of, to jury, 468.

— selection of, 444ff.

Judges, appointment of, 446.

— compensation of, 451f.

— election of state, 432, 445.

— recall of, 450, 453.

— removal of, 452f.

— supreme court, 439f.

— tenure of state, 431, 451.

Judgments, declaratory, 496.

Judicial control over cities, 509f.

Judicial council, state, 493f.

Judicial decisions, recall of, 454.

Judicial elections and party organizations, 445f.

Judicial machinery, unification of, 493f.

Judicial primary, non-partisan, 448.

Judicial procedure, 457ff.

- Judicial reform, 491*ff.*
- Judicial review of administrative action, 489*ff.*
- Judicial review of commission orders, 365*f.*
- Judicial review of legislation, 482*ff.*
- Judicial review of legislative apportionment, 156.
- Judicial superintendent, chief, 491*f.*
- Judiciary, control by, over the administration, 253*f.*
  - the colonial, 429*f.*
  - in first state constitutions, 430*f.*
  - in model state constitution, 531*ff.*, 569*ff.*
- Jurisdiction of state courts, 442*ff.*
- Jurors, selection of, 466*f.*
- Jury, indictment by grand, 461.
  - trial by, 459*f.*, 462*f.*
- Jury system, the, 466*ff.*
- Justice, administration of criminal, 611*ff.*
  - state department of, 414*ff.*
  - the chief, 439*f.*, 449*f.*
- Justices of the peace, 433*f.*
  
- Labor, conditions of, 372*ff.*
  - convict, 391*f.*
  - hours of, 374*ff.*
- Labor laws, administration of, 394*f.*
- Labor legislation, state, 371*ff.*
- Labor of women and children, regulation of, 373*f.*
- Law, development of, 455*f.*
  - enforcement of, 163, 229*f.*, 413*ff.*
- Legislation, direct, 128*ff.*
  - governor's initiative in, 220*ff.*
  - judicial review of, 482*ff.*
  - special, 179*ff.*
- Legislation for cities, special, 502.
- Legislative control over cities, 501*f.*
- Legislative council, proposed, 208*f.*
- Legislative employees, 186*f.*
- Legislative power, delegation of, 175*f.*
- Legislative procedure, 181*ff.*
- Legislative proposal of constitutional amendments, 44*f.*
- Legislative reference bureaus, 200.
- Legislative reform, 203*ff.*
  
- Legislative rules, working of, 194*ff.*
- Legislative sessions, 170*f.*
  - split sessions, 171.
- Legislators, compensation of, 172.
  - privileges of, 172.
- Legislature and governor, relations between, 284*ff.*
  - apportionment of members in, 153*ff.*
  - constitutional limitations on, 176*ff.*
  - control of, over the administration, 250*f.*
  - decline in power of, 145*f.*
  - difference between the houses of, 152*f.*
  - differences in powers of houses of, 176*f.*
  - election of members of, 165*ff.*
  - end-of-the-session rush in, 199*f.*
  - gavel rule in, 196*f.*
  - governor's power over organization of, 217.
  - governor's power over adjournment of, 218.
  - historical development of, 141*ff.*
  - in model state constitution, 521*ff.*, 546*ff.*
  - officers of, 185*ff.*
  - power of, over the judiciary, 431.
  - powers of, 174*ff.*
  - implied limitations on power of, 175.
  - repassage of bills by, over governor's veto, 225*f.*
  - roll-calls in, 190.
- Liability, employer's, 382*f.*
- Licensing, examining and, 407.
- Lieutenant-governor, the, 186, 216, 242*f.*, 557.
- Limitations on state powers, 51*ff.*
- Liquor legislation, 65.
- Literacy test for voting, 86*f.*
- Litigation, expense of, 495*f.*
- Lobby, the, 201.
- Local government, the state and, 499*f.*
  - Local option, 129, 420.
- Local rural government, the state and, 513*f.*
- Lynching cases, 469*f.*

- Manager, the city, 512, 622, 624ff.  
 Massachusetts ballot form, 104ff.  
 Mayor and council form, 510, 618, 621.  
 Merit system in civil service, 269ff.  
 Messages, governor's, 220f.  
 Military power, governor's, 239f.  
 Militia, the state, 423f.  
 Minimum wage, the, 380ff.  
 Minority representation in Illinois, 167ff.  
 Municipal charters, 502, 505.  
 Municipal corporations, 499ff., 537ff.  
   — special, 514f.  
 Municipal courts, 434.  
 Municipal home rule, 505ff.  
 Municipal indebtedness, 507.  
 Municipally owned utilities, 367f.  
  
 National and state cooperation, 14ff.  
 National intervention in the states, 14.  
 Newspapers, regulation of, 139.  
 Nineteenth amendment, the, 83ff.  
 Nomination of candidates, 95ff.  
 Nomination by direct primary, 110ff.  
 Nomination of judges, 447ff.  
 Nonpartisan League, the, 90, 369.  
 Nonpartisan primary, the, 121.  
 Normal schools, state, 402f.  
  
 Occupations, regulation of, 64.  
 Open primary, the, 114f.  
 Opinions, advisory, 458.  
   — judicial, 441, 458.  
 Opinions of attorney-general, 416.  
  
 Pardoning power, governor's, 475ff.  
 Pardons, board of, 479.  
   — conditional, 480f.  
 Parole system, 474.  
 Parties, political, regulation of, 88ff.  
 Party committees, 92ff.  
   — representation of women on, 93f.  
  
 Party control in legislatures, 166.  
 Party conventions, 91f.  
 Party issues in legislatures, 185f.  
 Party organization, 91ff.  
   — effect of direct primary on, 116f.  
 Party organization and judicial elections, 445f.  
 Party platforms, 94.  
 Party platforms and governor's recommendations, 221f.  
 Party system, the, 87ff.  
 Personal and property rights, regulation of, 55ff.  
 Petitions, initiative and referendum, 131f.  
   — number of primary, 118.  
   — preparation of primary, 112.  
 Picketing, 388.  
 Platforms, party, 94.  
 Pocket veto, 222.  
 Police, municipal, 424.  
   — state, 425f.  
   — state control of municipal, 508.  
 Police power, 58ff.  
   — constitutional limitations on, 67ff.  
   — economic phase of the, 63f.  
   — nature of the, 58ff.  
   — objects of the, 60ff.  
   — scope of the, 60ff.  
 Powers and limitations, state, 51ff.  
 Powers, the separation of, 34ff.  
 Pre-primary conventions, 117.  
 Primary, closed, 113ff.  
   — expense of direct, 119.  
   — nonpartisan, 121.  
   — nonpartisan judicial, 448.  
   — open, 114f.  
 Primary election, direct, 110ff.  
 Probate courts, 434.  
 Probation, 475.  
 Procedure, in civil cases, 459f.  
   — in criminal cases, 460ff.  
   — judicial, 459ff.  
 Promotions in civil service, 275.  
 Property, rights of, 34.  
 Proportional representation, 87, 122, 169f., 207f., 512n., 581ff.  
 Prosecuting attorneys, local, 418f.  
 Public ownership of utilities, 367f.  
 Public policy law of Illinois, 131.

Public utilities, regulation of, 360ff.  
Purchase of supplies, 330.

Qualifications of legislators, 166.  
Quarantine, establishment of, 407.

Race legislation, 66f.  
Railroads, regulation of, 355ff.  
Rate-making power, the, 356, 364.  
Recall of judges, 9, 450, 453.  
Recall of judicial decisions, 454.  
Recall, the popular, 126ff.  
Referendum, the popular, 128ff.  
Reform, civil service, 272f.  
Registration of voters, 98.  
Religious liberty, 33.  
Removal, governor's power of, 234ff.

Removal of civil service employees, 276.

Representation, bases of, 157ff.  
— reduction of, of Southern states, 78.

Republican form of government in the states, 12f.

Revenue, sources of state, 303.  
Revenues, separation of state and local, 318ff.

Riders, 223.  
Rights, bill of, 32f.

Rotten boroughs, 157f.

Rural government, problems of, 641ff.

Rural government, the state and, 513f.

Schools, state supervision of local, 400ff.

Secretary of state, 245f., 254, 346f.  
Senate, confirmation of appointments by, 232f., 293f.

Sentence, the indeterminate, 472f.  
Separation of powers, the, 34ff.

Separation of state and local revenues, 318ff.

Sessions, special legislative, 218ff.  
Short ballot, the, 122ff., 270, 591ff., 625.

Shreveport rate case, 358.

Slate-making, 97.

Speaker\* of the house, the, 185f.

Speech and press, freedom of, 33.

States, admission of into the Union, 7ff.

— and amendments to Federal Constitution, 12.

— and national elections, 11.

— differences and similarities of the, 4.

— not endowed with sovereignty, 1.

— place of, in the Union, 1.

— powers of the, 2.

— rights and obligations of, 10ff.

Strikes, 387f.

Suffrage, and elections, 536f.

— negro, 77ff.

— right of, 74f.

— woman, 83ff.

Superintendent of public instruction, state, 399f.

Supplies, purchase of, 330.

Supreme court, state, 435ff.

Tax administration, decentralization in, 320f.

Taxation and finance, 537.

Taxation, classification of objects of, 322ff.

Taxation of corporations, 316ff.

Tax commissions, state, 313f.

Taxes, equalization of, 310ff.

Tax, general property, 305ff.

— on incomes, 323f.

— on inheritances, 323.

— on mortgages, 323.

— on securities, 323.

Taxing power of states, limits on, 52ff.

Terms of legislators, 165.

Territory, Northwest, 7.

— Louisiana, 7.

Town meeting, the, 514.

Townships, 499, 513f., 647ff.

Towns, representation of, 160.

Transportation act of 1920, 359.

Trial of criminal cases, 462f.

Unconstitutional, declaring laws, 482ff.

- Understanding clause of Mississippi constitution, 80*f*.  
Universities, state, 402*f*.  
Utilities, regulation of public, 360*ff*.  
  
Venue, change of, 462.  
Verdict, unanimous, 469.  
Veto power, governor's, 222*ff*.  
Voting, absent, 101.  
— compulsory, 100*f*., 133*n*.  
— cumulative, 167*ff*.  
— extent of actual, 100.  
— qualifications for, 85*ff*.  
Voting machines, 109.  
  
Wage, minimum, 380*ff*.  
Wages, payment of, 378*ff*.  
Woman suffrage, 83*ff*.  
— results of, 85.  
Women, hour legislation for, 375*f*  
— regulation of labor of, 373.  
— representation of, on party committees, 93*f*.  
Women voters, leagues of, 84.  
Workmen's compensation, 383*ff*.  
Writs, extraordinary, 442.  
  
Zoning ordinances, 68.

